

Life After *Bildisco*: Section 1113 and the Duty to Bargain in Good Faith

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[T]he status of the collective bargaining agreement when an employer goes into an insolvency court . . . is a problem, not heretofore acute, which may be of considerable importance the next time a wave of business failures hits the country.

T. Richard Witmer, 1938¹

I. INTRODUCTION

Several political and economic factors have converged recently to create a crisis for both bankruptcy and labor lawyers in dealing with the problems that arise when a unionized employer files for relief under the Bankruptcy Code. The recession of the early 1980s has been the most severe recession since World War II, dramatically increasing the number of business bankruptcy filings during the last five years.² Approximately twenty percent of the labor force are union members, making the status of a collective bargaining agreement a potential issue in over 14,000 business bankruptcies filed each year.³

The recent recession has coincided with and encouraged a resurgence of the anti-union movement in the United States. The efforts of the corporate community

1. T. Richard Witmer, *Collective Labor Agreements in the Courts*, 48 YALE L.J. 195, 222 (1938).

2. From July 1, 1979, through June 30, 1984, 369,542 business bankruptcies were filed, more than double the number filed during the previous five years. 1 BROKEN BENCH REV. 7 (Jan. 1982); 1 BROKEN BENCH REV. 6 (Dec. 1982); 2 BROKEN BENCH REV. 83 (Dec. 1983); 3 BROKEN BENCH REV. 83 (Dec. 1984). The business bankruptcy filings during the previous five years, 1974-1979, totalled only 157,548. JUDICIAL CONFERENCE OF THE UNITED STATES, U.S. COURTS ADMIN. OFFICE, ANN. REP. DIR. 136-37 (1980).

3. The percentage of the nonagricultural labor force that is unionized has declined steadily from a high of almost 35% in 1954, to 27% in 1970, and to 23.6% in 1978. BUREAU OF LABOR STATISTICS, 1980 HANDBOOK OF LABOR STATISTICS 412. In 1980, only 20.9% of the total labor force was unionized, whereas by 1984, union membership had declined to approximately 19% of the work force. BUREAU OF NAT'L AFFAIRS, DIRECTORY OF UNITED STATES LABOR ORGANIZATIONS 1 (1983). U.S. Bureau of Labor Statistics, quoted in *Renewed Optimism at AFL-CIO Council Meeting*, 118 LAB. REL. REP. (BNA) 175 (March 4, 1985).

and conservative political forces to undermine union organization of workers received significant support from the defeat of the Labor Law Reform Act of 1978 in Congress,⁴ the election of Ronald Reagan in 1980, and the President's quick and successful decertification of the Professional Air Traffic Controllers' Organization (PATCO) in 1981.⁵ Widespread unemployment and layoffs have decimated the membership of many large unions, such as the United Auto Workers,⁶ and deregulation of the trucking and airline industries has added further to the woes of certain unions and employees.⁷ The incidence of labor strikes has declined to the lowest number since the Bureau of Labor Statistics began keeping records in 1947.⁸ All of these factors have provided the backdrop for employers' use of bankruptcy law against labor unions, organized employees, and collective bargaining agreements.⁹

Bankruptcy law has an impact on labor relations because provisions of the Bankruptcy Code¹⁰ allow an employer to take certain actions which are prohibited by the National Labor Relations Act (NLRA).¹¹ To illustrate the way in which the conflict between bankruptcy law and labor law arises, consider this scenario: An employer has a collective bargaining agreement with a labor union representing its

4. H.R. 77, 95th Cong., 1st Sess., 123 CONG. REC. 128 (1977). See also *AFL-CIO Executive Council Summer Meeting and AFL-CIO Building Trades Legislative Conference*, 1978 LABOR RELATIONS YEARBOOK (BNA) 252, 253, 254 (1979); Mills, *Flawed Victory in Labor Law Reform*, HARV. BUS. REV. May-June 1979, at 92.

5. Professional Air Traffic Controllers' Org., 7 F.L.R.A. No. 10 (Oct. 22, 1981), *aff'd*, 685 F.2d 547 (D.C. Cir. 1982).

6. The UAW lost over 26% of its membership from 1978 to 1983, shrinking from 1.5 million in 1978 to 1.1 million in 1983. *Detroit's Jobs That Will Never Come Back*, BUS. WK., May 23, 1983, at 168.

7. Both the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, codified at 49 U.S.C. § 334 (1982), and the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, codified at 18 U.S.C. § 1114 (1982), 49 U.S.C. §§ 10101-11902a (1982) resulted in the formation of nonunion carriers and a consequent loss of jobs among the unionized employees of older carriers. Daniels, *The Origins and Impact of Deregulation*, 1 HOFSTRA LAB. L. F. 63, 65-66 (1983). By 1983, the Teamsters Union had reportedly lost 500,000 members. Zifchak, *Collective Bargaining in the Reagan Era: A Management Perspective*, 1 HOFSTRA LAB. L. F. 1, 5 n.13 (1983).

8. The number of work stoppages involving 1,000 or more workers fell from 235 in 1979 to 187 in 1980, and then declined to 62 in 1984. In comparison, the number fell below 200 only twice between 1947 and 1979. 108 MONTHLY LAB. REV., June 1985, at 95.

9. This is not the first period in our legal history in which bankruptcy law has been used to control or defeat the unionization of employees. The development and use of the injunction remedy against labor strikes had its origins in the equity jurisdiction of the federal courts involved in the administration of railroad receiverships beginning in the 1870s. See Nelles, *A Strike and Its Legal Consequences—An Examination of the Receivership Precedent for the Labor Injunction*, 40 YALE L.J. 507 (1931); F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 23 (1930). The federal courts' widespread use of labor injunctions to combat the unionization of the railroads resulted in the first major labor legislation in the U.S.: the Railway Labor Act, passed in 1926, 45 U.S.C. §§ 151-88. It is this history of the use of receiverships and bankruptcy law to suppress unionization of the railroads that caused Congress to protect the collective bargaining agreements of railroad employees in § 77(n) of the Bankruptcy Act. This exception for railroad employees' collective bargaining agreements is carried forward in § 1167 of the Bankruptcy Code. See *infra* note 61 and accompanying text.

10. 11 U.S.C. §§ 101-151326 (1982). The Bankruptcy Code, enacted as the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, went into effect Nov. 6, 1979. Pub. L. No. 95-598 § 402, 92 Stat. 2682. Although the Code completely reorganized bankruptcy law, the substance of the law on the rejection of executory contracts remained essentially the same until 1984. Compare §§ 70(b) and 313 of the Bankruptcy Act, former 11 U.S.C. §§ 110(b) and 713(1), with § 365 of the Bankruptcy Code, 11 U.S.C. § 365. Compare § 77(n) of the Bankruptcy Act, former 11 U.S.C. § 205(n), with § 1167 of the Bankruptcy Code, 11 U.S.C. § 1167.

11. 29 U.S.C. §§ 151-69 (1982). The National Labor Relations Act (NLRA) was first passed in 1935 and was known as the Wagner Act. 49 Stat. 449 (1935). It was substantially revised in 1947 by the Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947). The Taft-Hartley Act is officially known as the Labor Management Relations Act, 29 U.S.C. § 141 (1982). Although the NLRA as revised is technically a part of the Labor Management Relations Act, it will be referred to throughout this article by its original name, the NLRA. When other sections of the Taft-Hartley Act are discussed, specifically § 301, they will be referred to as part of the Labor Management Relations Act.

employees.¹² The collective bargaining agreement is a three-year agreement, and will not expire for another year and a half. The employer's business is experiencing severe financial difficulties, so the employer decides to seek relief by filing a reorganization petition under Chapter 11 of the Bankruptcy Code.¹³ The employer would like to reduce the wages it pays its employees, but to do so would violate the collective bargaining agreement. Furthermore, the NLRA prohibits an employer from unilaterally modifying a collective bargaining agreement during the term of the contract.¹⁴ Once the employer files a bankruptcy petition, however, the Bankruptcy Code allows a debtor-in-possession to reject an executory contract.¹⁵ Consequently, at the same time the employer files its bankruptcy petition, it files an application to reject its collective bargaining agreement. The bankruptcy court approves the employer's request for rejection, and the collective bargaining agreement is terminated. Now that the employer has no contract with the union, it immediately reduces the wages it pays its employees. At this point, not only has the employer violated the NLRA by terminating the contract during its term, but it has also violated the NLRA by reducing wages without first bargaining in good faith with the union for a new contract.

This scenario introduces two separate areas of conflict: (1) the conflict over the status of the collective bargaining agreement itself, and (2) the conflict over the employer's duty to bargain for a new collective bargaining agreement. These areas of conflict will be analyzed in light of the United States Supreme Court's decision in *NLRB v. Bildisco & Bildisco*¹⁶ and Congress' subsequent enactment of section 1113 of the Bankruptcy Code.¹⁷

The conflict between what actions an employer may take under bankruptcy law and what it may do under labor law has been difficult to resolve for several reasons. First, bankruptcy and labor law are both areas of federal law. There is no supremacy clause to tell the courts which law should prevail.¹⁸ Furthermore, a collective

12. A typical collective bargaining agreement, signed by the employer and the union which represents the employees, contains provisions on wages, fringe benefits, leave policies, hours, work assignments, job-bidding procedures, layoff and recall of employees, and a variety of other terms and conditions of employment. Perhaps the most important provisions are its grievance and arbitrations clauses, providing for binding arbitration of disputes which arise under the contract, and the promise by the union to not call a strike during the term of the contract. Most collective bargaining agreements are for a three-year term because of the "contract bar" doctrine developed by the National Labor Relations Board (NLRB), under which a contract will only bar a union representation election for up to three years.

13. 11 U.S.C. §§ 1101-74 (1982). Under Chapter 11, a debtor receives protection from lawsuits by creditors and remains in control of the business, subject to court supervision, while either liquidating the business or working out a reorganization plan to pay whatever percentage of its debts it can afford and whatever percentage its creditors will accept in order to allow the business to continue operating. Ayer, *The New Chapter 11*, NORTON BANKR. L. ADVISOR, June, 1985, at 1.

14. NLRA § 8(d), 29 U.S.C. § 158(d) (1982). See *infra* note 48 and accompanying text.

15. When an employer files a reorganization petition under Chapter 11, the employer becomes a "debtor-in-possession." 11 U.S.C. § 1101(1) (1982). As debtor-in-possession, the employer has many of the rights and powers of a bankruptcy trustee, including the right to reject executory contracts under § 365(a) subject to court approval. See 11 U.S.C. §§ 1107(a), 365(a) (1982). If the bankruptcy court approves this rejection, the contract is treated as if it had been breached by the debtor on the day before bankruptcy was filed.

16. 465 U.S. 513 (1984).

17. 11 U.S.C.A. § 1113 (West Supp. 1985), providing for the rejection of collective bargaining agreements, was enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541(c), 98 Stat. 333, 391.

18. The great bulk of the legal relationships affected by bankruptcy are based on state-created rights of property

bargaining agreement is a special kind of contract, growing out of a continuing bargaining relationship between an employer and a union, and cannot be dealt with as an ordinary commercial contract. Collective bargaining agreements have been accorded their own special status under federal law. Finally, the duty to bargain between the employer and the union survives the termination of collective bargaining agreements and limits an employer's ability to make subsequent changes in working conditions. Because of the impossibility of breaking off the bargaining relationship, it is difficult to apply the bankruptcy law of rejection to an organized employer.

II. THE DUTY TO BARGAIN IN GOOD FAITH

A collective bargaining agreement is a unique document because it is the product of a relationship imposed on the employer by law, not a document produced by a voluntary relationship. Once a union has been chosen by a majority of employees, section 8(a)(5) of the NLRA imposes on the employer the obligation to bargain in good faith with the union on wages, hours, and other conditions of employment.¹⁹ The duty to bargain imposed by section 8(a)(5) is defined in section 8(d) as

the performance of the mutual obligation of the employer and the representative of the employees *to meet at reasonable times and confer in good faith* with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession²⁰

The National Labor Relations Board (NLRB) and the federal courts will find that a party is bargaining in good faith if the party has an "open mind and a sincere desire to reach an agreement."²¹ Whether each party has the requisite state of mind must be discerned from the totality of the conduct of each party.²² No one factor is conclusive;

and contract derived from each state's statutes and common law. See Countryman, *The Use of State Law in Bankruptcy Cases* (P.L.), 47 N.Y.U. L. Rev. 407, 412 (1972). Consequently, the majority of legal conflicts that arise in bankruptcy practice are conflicts between state laws controlling property rights and the debtor-creditor relationship on the one hand, and the substantive provisions of the Bankruptcy Code on the other, such as those on lien avoidance, priority of debts, and discharge. When such conflicts arise, the Bankruptcy Code, enacted under the explicit authority of Article I of the United States Constitution, takes precedence over state law by virtue of the supremacy clause. Article I of the Constitution provides that Congress may "establish . . . Uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. The supremacy clause provides: "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. See, e.g., *National Collection Agency v. Trahan*, 624 F.2d 906, 907 (9th Cir. 1980); *In re U.S. Financial, Inc.*, 594 F.2d 1275, 1279 (9th Cir. 1979).

19. § 8(a)(5) provides:

It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

§ 9(a) provides in relevant part:

Representatives designated or selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours or employment, or other conditions of employment.

National Labor Relations Act §§ 8(a)(5), 9(a), 29 U.S.C. §§ 158(a)(5), 159(a) (1982).

20. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1982) (emphasis added).

21. *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943) (quoting from *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 885 (1st cir.), cert. denied, 313 U.S. 595 (1941)).

22. *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477 (1941).

a determination of good or bad faith is based on many factors, such as frequency and duration of meetings, exchange or lack of exchange of counteroffers, willingness to consider counteroffers, repetitious offering of clearly unacceptable proposals, and inability to reach agreement on any significant issue.²³ If negotiations between the parties are successful, a collective bargaining agreement is drafted and signed.

If negotiations are not successful, the parties must continue to bargain until they reach impasse. Impasse is reached when the parties have discussed each issue for a reasonable period of time, have failed to agree, and neither side is willing to change its position.²⁴ An impasse suspends the duty to bargain, but only temporarily until circumstances change or one of the parties changes its position.²⁵

The duty to bargain under section 8(a)(5) includes a further obligation on the employer that becomes crucial in the bankruptcy context. Once employees are represented by a union, the employer may not make any changes in wages, hours, or other "mandatory" bargaining subjects without first bargaining to impasse.²⁶ When a union is first elected and is bargaining with the employer for an initial contract, the employer must continue to abide by the same terms and conditions of employment then in effect until impasse is reached or a contract signed. The same rule applies when a contract expires and the parties are negotiating a new contract. If an employer wants to make a change in the status quo under an expiring collective bargaining agreement, the employer must first present the proposed change to the union and bargain to impasse on it. Once impasse is reached, the employer may then unilaterally implement any changes in the status quo consistent with its last offer to the union.²⁷

23. Because the concept of good faith is so elusive and fact-sensitive, the possible fact patterns and cases discussing good faith bargaining are endless. For a summary of good faith bargaining determinations, see C. MORRIS, *THE DEVELOPING LABOR LAW* 570-606 (2d ed. 1983).

24. An impasse is "a state of facts in which the parties, despite the best of faith, are simply deadlocked." *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 482 (5th Cir. 1963). Factors in deciding whether impasse has been reached include length of negotiations, good faith efforts to reach agreement, and the importance of the subjects on which agreement cannot be reached. *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967).

25. In *Charles D. Bonanno Linen Serv. v. NLRB*, 454 U.S. 404 (1982), the Court described impasse thus: "As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Id.* at 412 (citation omitted).

26. The Supreme Court in *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958), divided bargaining subjects into two categories: mandatory and permissive. Mandatory subjects are "wages, hours, and other terms and conditions of employment." National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1982). For example, under court interpretations, an employer's decision to subcontract work is a mandatory subject of bargaining. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964). An employer's decision to partially close a plant, however, is not a mandatory subject, but a permissive one. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Permissive subjects are essentially all those that are neither mandatory nor illegal subjects.

If an issue is a mandatory subject of bargaining, it is a violation of § 8(d) to refuse to bargain over it. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). On the other hand, to insist to impasse on an issue that is merely a permissive subject is also a violation of the duty to bargain, since it is in effect a refusal to bargain over the mandatory subjects. *Id.*

In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court held that "an employer's unilateral change in conditions of employment under negotiation is . . . a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate" *Id.* at 743. Consequently, if the employer wishes to make a change in operations which involves a mandatory subject of bargaining, the employer must bargain to impasse before making the change.

27. For example, in the 1983 national Greyhound negotiations for a new contract, Greyhound wanted to reduce wages and requested that the bus drivers accept a 9.5% decrease in the expiring wage rate. The union refused to agree to the company's offer and, after the contract expired, went out on strike. The company then implemented the 9.5% decrease after reaching impasse in negotiations. *N.Y. Times*, Nov. 13, 1983, Part I at 26, col. 1. Once impasse was

Under the NLRA, the employer's obligation to bargain in good faith continues throughout the relationship between the employer and the union. It is not suspended by the signing of a collective bargaining agreement. Both parties are obligated to bargain at any time over any term or condition of employment *not* addressed by the collective bargaining agreement itself.²⁸ Incorporating specific items into a collective bargaining agreement, however, waives the duty of either party to bargain again on those items during the term of the contract.²⁹

III. COLLECTIVE BARGAINING AGREEMENTS UNDER FEDERAL LAW

A. Section 301 of the Labor Management Relations Act

A collective bargaining agreement is created and enforced under federal law, not state law. State-created common law principles of contract formation, interpretation, and breach do not apply to collective bargaining agreements. The federal law which controls the interpretation and enforcement of collective bargaining agreements has been developed by the federal courts under section 301 of the Labor Management

reached, the company was free to adopt its last wage offer as its new term of employment. This unilateral change made by the employer was consistent with the employer's bargaining position at the time impasse was reached.

28. "Collective bargaining is a continuing process . . . [that] involves . . . resolution of new problems not covered by existing agreements." *Conley v. Gibson*, 355 U.S. 41, 46 (1957). The employer has a duty to bargain "as to subjects which were neither discussed nor embodied in any of the terms and conditions of the contract." *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 684 (2d Cir. 1952). A union, however, may explicitly waive its right to bargain during the contract term about mandatory subjects of bargaining not covered by the contract by agreeing to a zipper clause in the contract. A zipper clause specifies that the written collective bargaining agreement contains all agreements between the parties, and the union waives its right to bargain during the contract's term about any matters not contained in the contract. For a zipper clause to constitute a waiver, however, there must be clear and unmistakable evidence from the bargaining history, completeness of the contract, or the actual contract language that the union intended to give up its right to bargain over a particular subject. *Columbus & S. Ohio Elec. Co.*, 270 N.L.R.B. 686 (1984); *Bancroft-Whitney Co.*, 214 N.L.R.B. 57 (1974); *Radioear Corp.*, 214 N.L.R.B. 362 (1974). The courts have held that waiver of the right to bargain over a specific subject will not be extended to cover a more general subject. *See, e.g., NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967). *See generally MORRIS*, *supra* note 23, at 641-63, 672-74.

When issues arise during the life of a contract which are not controlled by the collective bargaining agreement or upon which the parties have not waived their bargaining rights, the employer is under a continuing obligation to bargain with the union prior to taking unilateral action. For example, if an employer wants to subcontract work, but (1) the employer has never subcontracted such work before, and (2) the collective bargaining agreement is silent on the issue of subcontracting, the employer must bargain to impasse with the union before it may subcontract the work. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964). If the employer makes this change without bargaining, the employer has violated § 8(a)(5). The provisions of the collective bargaining agreement may or may not be relevant to the NLRB's unfair labor practice determination. Although there may be instances when such a unilateral change is both a violation of § 8(a)(5) and a violation of the collective bargaining agreement, the duty to bargain does not arise from the contract, but from the statutory obligation contained in the NLRA. "The fact that the unfair labor practice is also a breach of contract for which the injured party might have another remedy . . . does not displace the authority of the Board to deal with and remedy the unfair labor practice." *Nassau County Health Facilities Ass'n*, 227 N.L.R.B. 1680, 1684 (1977). *See also NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967) (Board had jurisdiction to interpret contract clause to determine if employer had unilaterally changed a term of employment in violation of § 8(a)(5)).

29. The duty to bargain during the term of the contract is defined, in part, in § 8(d) as follows:

[T]he duties so imposed shall not be construed as requiring either party to discuss or agree to any modifications of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

29 U.S.C. § 158(d) (1982). In interpreting § 8(d), the National Labor Relations Board has stated that, "[a]s to the written terms of the contract, either party may refuse to bargain further about them" during the term of the collective bargaining agreement. *Allied Mills*, 82 N.L.R.B. 854, 862 (1949).

Relations Act, passed in 1947.³⁰ In 1957, in its first interpretation of section 301, the Supreme Court held that section 301 "authorize[d] federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements."³¹ Since 1957, the Court has developed a federal common law of collective bargaining agreements, using as its basis the NLRA, the Labor Management Relations Act (Taft-Hartley), the Norris-LaGuardia Act,³² the Landrum-Griffin Act,³³ and the "penumbra" of these statutes and the Congressional policies they exemplify, as divined by the Court.³⁴ Consequently, today's disputes over breach of collective bargaining agreements are normally litigated in federal district court and are controlled by federal labor law principles under section 301, not the common law of ordinary contracts. When a collective bargaining agreement becomes embroiled in a bankruptcy proceeding, the bankruptcy court must look to the body of federal law under section 301 to interpret and determine the nonbankruptcy status of the agreement and any claims arising under it.

Because collective bargaining agreements have been enforced under federal law for only twenty-nine years, a relatively short time in the development of a common law, the exact legal nature of a collective bargaining agreement has never been clearly defined.³⁵ The Supreme Court has described a collective bargaining agreement in

30. Pub. L. No. 80-101, 61 Stat. 136 (1947), 29 U.S.C. §§ 141-97 (1982). § 301 is codified as 29 U.S.C. § 185. The Labor Management Relations Act is better known as the Taft-Hartley Act. *See supra* note 11. § 301(a) reads: Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1982). Many argued that § 301 was unconstitutional because it attempted to give jurisdiction to the federal courts without creating any substantive federal law under which such suits would arise. *See Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460 (1957) (Frankfurter, J., dissenting). Any doubts were resolved, however, when the Supreme Court upheld the statute as constitutional in *Lincoln Mills*. *Id.* at 457.

31. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957).

32. Pub. L. No. 72-65, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1982). This statute withdraws jurisdiction from the federal courts to issue injunctions in labor disputes except in very narrow circumstances and under strict procedural limitations.

33. Pub. L. No. 86-257, 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (1982). This statute regulates the internal affairs of unions and guarantees certain rights of union members to participate in union affairs.

34. The Court has held that, although state courts have concurrent jurisdiction under § 301 to enforce collective bargaining agreements, state courts must apply federal substantive labor law in interpreting and enforcing these contracts. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962).

35. *See Cox, The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1 (1958); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955); Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525 (1969); and Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973).

Three theories of the contractual nature of a collective bargaining agreement are discussed in R. SMITH, L. MERRIFIELD, T. ST. ANTOINE, & C. CRAVER, *LABOR RELATIONS LAW* 703-04 (7th ed. 1984). Two of the theories, the agency theory and the third-party beneficiary theory, use traditional common law contract concepts. The agency theory is that the union, as agent, negotiates and signs the agreement for the employees, the principals. The third-party beneficiary theory is that the employer and union make mutual promises for the benefit of the third-party employees. The third theory treats the collective bargaining agreement as a kind of governmental code regulating a system of industrial self-government in each factory or work place. *See John Wiley & Sons v. Livingston*, 376 U.S. 543, 550 (1964); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-80 (1960).

Professor Corbin describes a collective bargaining agreement as follows:

A "collective bargain" is itself a "contract," but it is a contract of a very special kind. . . . The collective bargain has many features of a fundamental organizing statute. . . . The rights conferred by existing (and changing) legislation are not contract rights. . . . The collective bargain is certainly enforceable as a

varying terms over the years, emphasizing its nature either as an industrial code of self-government or as a third-party beneficiary contract. In one of the Court's earliest discussions of a collective bargaining agreement in 1944, Mr. Justice Jackson used both elements:

Contract in labor law is a term the implications of which must be determined from the connection in which it appears. . . . The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. . . .

After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings

But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits³⁶

In the *Steelworkers Trilogy*,³⁷ the Court's most significant set of labor decisions after adopting a federal common law of labor agreements in 1957, the Court reiterated the theme of the collective bargaining agreement as a kind of governmental code of labor relations:

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant

A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having that relationship governed by an agreed upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces.³⁸

The compulsory nature of the collective bargaining agreement is derived from the employer's duty to bargain in good faith. What emerges from this description is a realization that what is most significant about a collective bargaining agreement is

"contract" against the parties thereto, not only by the sanctions that newly adopted law may prescribe, but by the ordinary remedies of law and equity in contract cases. . . . The employees may or may not be regarded as parties to the bargain; but they are certainly beneficiaries of the bargain with legally enforceable rights. . . . [U]nion representatives act on behalf of all the employees . . . [but] are not ordinary "agents" of the employees.

6A A. CORBIN, CORBIN ON CONTRACTS § 1420 (1982). Corbin thus touches on the beneficiary, agency, and industrial self-government theories, showing the uncertain nature of the relationship between contract law and collective bargaining agreements.

36. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334–36 (1944).

37. *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

38. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578–80 (1960).

not its specific terms, but its existence as an embodiment of the continuous relationship between the employer and the union representing its employees.

Because of this need to protect and foster the bargaining relationship behind the contract, the Court has felt free to depart from traditional common law principles of contract law in construing specific provisions of collective bargaining agreements. For example, in *John Wiley & Sons v. Livingston*³⁹ the Court held that the duty to arbitrate grievances arising under a collective bargaining agreement survived a corporate merger, binding the successor corporation even though it had not assumed the contract. In so holding, the Court commented:

While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. . . . Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship.⁴⁰

The Court has continued to construe collective bargaining agreements as unique and special contracts in a variety of ways.⁴¹ The *John Wiley* opinion, however, is

39. 376 U.S. 543 (1964).

40. *Id.* at 550.

41. For example, the Court has rejected some of the normal legal incidents of third-party beneficiary contracts. In *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), the trustees of an employee retirement and welfare fund set up by the national collective bargaining agreement in the coal industry sued a coal company for failure to pay the full premiums required by the collective bargaining agreement. The coal company defended on the grounds that performance of its duty to pay the royalties to the fund was excused when the union violated the collective bargaining agreement with strikes and work stoppages. The Court acknowledged that the normal rule governing third-party beneficiary contracts would allow the company to set off, as a defense to the third-party's suit for recovery under the contract, the company's damage claim against the union. In rejecting this third-party principle, the Court stated:

This collective bargaining agreement, however, is not a typical third-party beneficiary contract. The [coal company] promisor's interest in the third party here goes far beyond the mere performance of its promise to that third party, *i.e.*, beyond the payment of royalty. . . . Not only has Benedict entered into a long-term relationship with the union in this regard, but in compliance with [federal law] it has assumed equal responsibility with the union for the management of the fund

Furthermore, Benedict promised in the collective bargaining agreement to pay a specified scale of wages to the employees. It would not be contended that Benedict might recoup its damages by decreasing these wages

Finally, a consideration which is not present in the case of other third-party beneficiary contracts is the impact of the national labor policy.

Id. at 468-70. Justice Frankfurter dissented from the holding, as he had in *Lincoln Mills*, arguing that the Court should be wary of creating any specialized law of collective bargaining agreements separate and apart from traditional notions governing the operation and interpretation of contracts. *Id.* at 471 (Frankfurter, J., dissenting). Justice Frankfurter was obviously reluctant to give courts a free hand in interpreting collective bargaining agreements under some still-to-be-discovered federal common law of labor relations and preferred that judges begin with well-established contract doctrines.

In a recent case involving a welfare fund trustee suit against an employer, *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984), the Court relied in part on *Lewis v. Benedict Coal* for the proposition that the company could not assert the same defense against the welfare fund trustee that it could assert against the union. The Court decided the case, however, under traditional contract notions, examining the language of the collective bargaining agreement to determine the intent of the parties.

Another example of the continuing tension between the Court's view of a collective bargaining agreement as a commercial contract and its view of it as a peculiar creation of federal common law is a series of opinions addressing the question of which statute of limitations to apply to a suit to enforce a collective bargaining agreement. Initially, the Court held that a suit to enforce a collective bargaining agreement under § 301, filed by a union against an employer to collect vacation pay, "closely resemble[d] an action for breach of contract cognizable at common law." *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705 n.7 (1966). In deciding which was the most analogous state statute of limitations to apply, the Court reasoned that a suit to enforce a collective bargaining agreement is based in part upon the

perhaps the high-water mark of the Court's protection of a collective bargaining agreement, extending its reach beyond its own terms. Beginning in the 1970s, the Court began to restrict the "successor employer" doctrine as set forth in *John Wiley*. The Court protected a collective bargaining agreement once it had been formed, but refused to bind a subsequent employer of the same workers to the preceding employer's contract, unless the successor had voluntarily assumed it.⁴² The Court based this refusal to bind a successor employer on its holding in *H.K. Porter*⁴³ that

written collective bargaining agreement, but is also based upon the oral contracts of hire between the employer and each employee. Because this resulting "contract" was partly written and partly oral, the Court chose the six-year state statute of limitations on contracts "not in writing." *Id.* at 707.

In two cases decided in 1981 and 1983, however, the Court rejected state statutes of limitation governing contract actions, ultimately choosing the six-month statute of limitations contained in the NLRA for filing unfair labor practice charges. These cases involved not only a § 301 claim for an alleged breach of contract by an employer, but also a claim for breach by the union of the duty of fair representation which it owes to every employee it represents. *See United Parcel Serv. v. Mitchell*, 451 U.S. 56 (1981); *Del Costello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983). In justifying its departure from state contract statutes of limitation, the Court quoted from Justice Goldberg's concurring opinion in *Humphrey v. Moore*, 375 U.S. 335 (1964):

[I]n this Court's fashioning of a federal law of collective bargaining, it is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process. We should not assume that doctrines evolved in other contexts will be equally well adapted to the collective bargaining process.

Del Costello v. International Bhd. of Teamsters, 462 U.S. 151, 172 (1983) (quoting *Humphrey v. Moore*, 375 U.S. 335, 358 (1964) (Goldberg, J., concurring)). Again, it is the nature of the collective bargaining process that is important, not the status of the agreement as a discrete contractual document.

Finally, in *Bowen v. U.S. Postal Serv.*, 459 U.S. 212 (1983), a third suit involving an employee's claim against the union for breach of the duty of fair representation and his claim against the employer for breach of the collective bargaining agreement, the Court rejected the union's argument that only an employer can be held liable for damages for discharging an employee in breach of the contract. The Court explained:

The difficulty with this argument is that it treats the relationship between the employer and employee, created by the collective-bargaining agreement, as if it were a simple contract of hire governed by traditional common-law principles. This reading . . . fails to recognize that a collective-bargaining agreement is much more than traditional common-law employment terminable at will. Rather, it is an agreement creating relationships and interests under the federal common law of labor policy.

Id. at 220. Relying on the nature of the relationship between the employer, the union, and the employees, the Court departed from general contract law and held that the union, as well as the employer, was liable for a portion of the damages arising from the employer's breach of the collective bargaining agreement. The breach of contract claim and the duty of fair representation claim are closely related in that the employee cannot prevail against the company on the breach of contract claim unless the employee first shows that the union breached its duty of fair representation in representing the employee during the grievance and arbitration process. *See infra* note 47. Consequently, in *Bowen* the Court held:

[T]he employer discharged the employee wrongfully and remains liable for the employees' backpay. . . . The union's breach of its duty of fair representation, however, caused the grievance procedure to malfunction resulting in an increase in the employee's damages. . . . [T]he union is responsible for the increase in damages and . . . should bear its portion of the damages.

Id. at 223. The Court approved the result reached at the trial court level where the apportionment of damages between the defendants had been left to the jury's discretion, with the jury accepting the district court's suggestion that apportionment be based on the date of a hypothetical arbitration decision representing the earliest date the employer would have reinstated the plaintiff if the union had fulfilled its duty of fair representation. *Id.* at 215.

42. *See NLRB v. Burns Sec. Serv.*, 406 U.S. 272 (1972) (successor employer who had maintained substantial continuity of the business and identity of workforce but had not assumed the existing collective bargaining agreement was not bound by its terms; however, because it hired a majority of its employees from the employees of the former employer, it was obligated to bargain with the union which continues to represent a majority of the successor's workforce); *Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel & Restaurant Employees*, 417 U.S. 249 (1974) (absent express assumption of collective bargaining agreement, purchaser of business was under no duty to arbitrate any grievances arising under the former employer's contract with union).

On the other hand, in cases not involving a successor employer, the Court continued to protect collective bargaining agreements and the duty to resolve contract disputes under the contracts' arbitration procedures. In *Nolde Bros. v. Local No. 358*, 430 U.S. 243 (1977), the Court held that the duty to arbitrate severance pay claims which arose under the contract continued even though the contract itself had expired.

43. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

the NLRA does not give any power to the NLRB or a federal court to compel an employer to enter into any specific collective bargaining agreement, or to agree to any particular contract term, no matter how egregious the employer's violation of the duty to bargain in good faith has been.⁴⁴ The parties must bargain in good faith, but they are free to agree or disagree on any given contract proposals. The bargaining relationship is compelled by law, but the provisions of a collective bargaining agreement must be the result of voluntary agreement.

Scholars, as well as the Supreme Court, have proposed various ways to characterize the bargaining agreement produced as a result of the legal compulsion to bargain in good faith. Professor Clyde Summers argues that, although the collective bargaining agreement may not be an ordinary contract, it is one variety of contract nonetheless.⁴⁵ Professor David Feller, on the other hand, rejects traditional contract analysis, arguing that the bulk of the provisions in a collective bargaining agreement are work rules, which are not judicially enforceable contract terms. In his view, the contract contains only two judicially enforceable promises: (1) the employer's promise to resolve any contract disputes through the grievance and arbitration procedure,⁴⁶ and (2) the union's promise not to call a strike during the term of the contract.⁴⁷

44. *Id.* at 108. The Court relied on the explicit language contained in § 8(d) that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d) (1982).

45. Professor Summers states that although the complex, multi-party nature of collective bargaining agreements and the ambiguities which the bargainers accept in order to reach agreement distinguish collective bargaining agreements from many commercial contracts, these characteristics are also found in other types of modern contracts. Further, while he acknowledges that the employer and union, unlike most commercial parties, have a legal duty to bargain, he notes that the only compulsion to actually reach an agreement is economic, not legal. He concludes that collective bargaining agreements are sufficiently in the mainstream of contracts to be governed by general contract principles, such as recognized guides for interpreting contract ambiguity, but are too different from ordinary contracts to be governed by specific contract rules, such as third-party beneficiary rules. Summers, *supra* note 35, at 561-62.

46. It should be noted that under some collective bargaining agreements, unions also promise to grieve and arbitrate disputes at the employer's request, a so-called bilateral arbitration clause.

47. Feller, *supra* note 35, at 792-99. Again, in some contracts, the no-strike clause also includes a promise by the employer not to lock out employees during the term of the contract.

Under the federal common law of § 301 as developed by the Supreme Court, if an employer breaches the contract during its term, the union must grieve and arbitrate the breach. If a union sues to enforce the contract under § 301, the judicial remedy is an order of specific performance compelling the employer to arbitrate any breach. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). As long as a collective bargaining agreement contains an arbitration clause which arguably covers the dispute between the parties, a federal court will not give damages for breach, but will compel arbitration. *Drake Bakeries v. Bakery Workers Local 50*, 370 U.S. 254 (1962); *see also the Steelworkers Trilogy*, 363 U.S. 564 (1960). On the other hand, if a union calls a strike in breach of its no-strike promise, the employer may sue under § 301 to enjoin the strike and recover damages against the union. *See* § 301(b), 29 U.S.C. § 185(b); *Boys Mkts. v. Retail Clerks Local 770*, 398 U.S. 235 (1970). Employees themselves are not parties to the contract, make no promises under the contract, and, in turn, cannot be sued by the employer for damages for breach of the contract. Feller, *supra* note 35, at 774-92, 803. *See also Complete Auto Transit v. Reis*, 451 U.S. 401 (1981). Any wildcat strike in breach of contract by employees, however, may be enjoined.

In contrast to the limitations on the employer's right to sue an employee for breach, an employee can sue individually to enforce the contract against an employer. *See Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962). The employee's right to sue, however, is subject to formidable preconditions: (1) the employee must exhaust any contractual grievance and arbitration procedures, and (2) to avoid the finality of a grievance settlement by the union or an arbitration award, the employee must prove the union breached its duty of fair representation in processing the grievance or in representing the employee at an arbitration hearing. *See Hines v. Anchor Motor Freight*, 424 U.S. 554, 567 (1976); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965).

B. Section 8(d) of the National Labor Relations Act

In addition to the enforcement of collective bargaining agreements in court under section 301 of the Labor Management Relations Act, the National Labor Relations Act also contains a proviso in section 8(d) which protects collective bargaining agreements from modification or premature termination. Under this proviso, an employer may not modify or terminate a collective bargaining agreement during its term except upon the consent of the union.⁴⁸ Furthermore, when negotiating a new contract upon expiration of the old one, the parties must fulfill certain notice requirements which are designed to create a cooling-off period before the union may strike.⁴⁹

Most disputes that arise during the term of a collective bargaining agreement involve questions concerning the application of specific contract terms to specific events, such as whether the employer correctly followed the contract's job-bidding procedures, or whether an employee was discharged for just cause. These disputes are resolved through the grievance and arbitration procedures set forth in the contract, and do not normally encompass a claim by the union that the employer is seeking to modify or change the contract itself. If the union believes, however, that the employer has not only violated the contracts provisions, but is seeking to modify the contract, the union may pursue the dispute under both the NLRA and the contract: it may file an unfair labor practice charge with the NLRB under section 8(d), and it may seek arbitration under the contract.⁵⁰

48. 29 U.S.C. § 158(d) (1982). Section 8(d) provides, in part:

Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that *no party to such contract shall terminate or modify such contract*, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) *continues in full force and effect*, without resorting to strike or lock-out, *all the terms and conditions of the existing contract* for a period of sixty days after such notice is given or *until the expiration date of such contract*, whichever occurs later:

. . . the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Id. (emphasis added). The effect of this provision is to prohibit any mid-term modification or termination of a contract for a fixed term except with both parties' agreement.

49. See § 8(d)(1) and (3). *Id.* These notice provisions also apply to any lock-out by the employer. § 8(d)(4).

50. Although the union may file a charge under § 8(d) and also pursue a grievance under the contract's grievance and arbitration procedures, this does not mean that both procedures will be followed to completion. If the grievance and arbitration procedures are completed before the unfair labor practice charges are filed, the Board may defer to the arbitrator's decision if the proceedings were fair, all parties had agreed to be bound by the arbitrator's award, the legal conclusions were consistent with Board law, and the statutory issue was factually parallel to the contractual issue. *Olin Corp.*, 268 N.L.R.B. 573 (1984); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

If an arbitration decision has not yet been rendered, the Board may stay its proceedings pending completion of the arbitral process. *United Technologies Corp.*, 268 N.L.R.B. 557 (1984); *Collyer Insulated Wire*, 192 N.L.R.B. 827 (1971). The Board decides whether prearbitral deferral is appropriate by looking at the parties' bargaining relationship,

IV. REJECTION OF COLLECTIVE BARGAINING AGREEMENTS IN BANKRUPTCY

A. *Prior to Bildisco*

The conflicts between labor law and bankruptcy law arise when an organized employer files for bankruptcy during the term of a collective bargaining agreement between the employer and the union. The initial issue in dispute is whether the employer may reject the collective bargaining agreement under section 365 of the Bankruptcy Code. If the contract may be rejected, then the second issue, whether the employer has the right to make unilateral changes, is reached.

To be eligible for rejection under section 365, a contract must be an "executory contract,"⁵¹ for which the Code does not contain any definition. The legislative history defines the term as including any contract "on which performance remains due to some extent on both sides."⁵² The concept of executory contract is difficult to apply to a collective bargaining agreement.⁵³ Nevertheless, the federal courts have

the presence of any antiunion animus, the scope of the arbitration agreement, and the role of the contract in the dispute. *Id.* at 842.

51. Section 365(a) provides that "[T]he Trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a) (1982).

52. S. REP. NO. 989, 95th Cong., 2d Sess. 58, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5844.

53. On the one hand, all unexpired collective bargaining agreements may be considered executory because they can never be executed or completed. There is no performance by either the employer or the union which will complete the contract. The parties have contracted for several things: (1) certain terms and conditions of employment to be maintained by the employer over a specified period of time; (2) a method for resolving disputes over those conditions; and (3) a promise not to interrupt production by strikes or lockouts during that time period. The contract governs the entire relationship between the parties, not a discrete transaction or series of transactions.

On the other hand, because the contract cannot be executed or completed by any given performance, one questions whether a collective bargaining agreement meets the bankruptcy definition of executory, which requires some performance to remain due by *both* parties to the contract. Performance remains due by an employer under many provisions of a typical collective bargaining agreement, but often a union's only contractual promise, as opposed to performance, is its no-strike promise. See Feller, *supra* note 35, at 792, 797-805. It is problematic whether the promise *not* to do something is an obligation of future performance sufficient to make the contract executory within the meaning of bankruptcy law. For example, the courts have disagreed over whether an unexpired promise not to compete is sufficient performance due to make the contract executory under the Bankruptcy Code. Compare *In re Cooper*, 47 Bankr. 842 (Bankr. W.D. Mo. 1985), *In re Norquist*, 43 Bankr. 224 (Bankr. E.D. Wash. 1984), and *In re Rovine Corp.*, 5 Bankr. 402 (Bankr. W.D. Tenn. 1980) (each finding that an unexpired covenant not to compete does constitute performance due) with *In re Sapsee*, 31 Bankr. 914 (Bankr. S.D. Fla. 1983) (holding that the contract containing an unfulfilled covenant not to compete was fully executed and, therefore, could not be rejected because it was no longer executory).

In his historic article on executory contracts published in 1973, Professor Vern Countryman proposed a more precise definition of the term "executory contract" than the one used by Congress in 1978 and adopted in *Bildisco*. Professor Countryman defined an executory contract as "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MICH. L. REV. 439, 460 (1973). Under Professor Countryman's definition—so far unperformed that the failure of either to complete performance would constitute a *material breach* excusing the performance of the other—a collective bargaining agreement would not qualify as an executory contract. Under the federal common law of labor contracts, the failure of either the employer or the union to perform its promises under the collective bargaining agreement does not constitute a material breach of the contract and does not excuse the other from continuing to honor the agreement. If employees strike during the contract's term over an arbitrable grievance, the strike may be enjoined. *Boys Mkts. v. Retail Clerks Local 770*, 398 U.S. 235 (1970). Furthermore, if the union was responsible for the strike, the employer can recover damages caused by the strike. Labor Management Relations Act § 301(b), 29 U.S.C. § 185(b) (1982). This breach of promise by the union, however, is not a material breach in that it does not excuse the employer from honoring the contract. The employer may not rescind the collective bargaining agreement, but remains bound by it. *Local 721 v. Needham Packing Co.*, 376 U.S. 247 (1964); *Drake Bakeries v. Bakery Workers Local 50*, 370 U.S. 254 (1962). Although the Court in *Drake Bakeries* commented that it was not deciding that under no circumstances could the employer rescind the contract, no subsequent cases have allowed such a rescission.

assumed, without much discussion, that collective bargaining agreements are executory under bankruptcy law, except when the contract has already expired by its own terms.⁵⁴

Likewise, the union remains bound by its contractual no-strike promise regardless of an employer's breach. The union's remedy for breach is to sue under § 301 to compel arbitration. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957). The union is not excused by the employer's breach from continuing to honor its promise not to strike. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 387 (1974); *Boys Mkts. v. Retail Clerks Local 770*, 398 U.S. 235, 238 (1970); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962). The union may strike during the term of a contract only if the contract expressly gives the union the right to strike or if the strike is over a dispute which is separate and apart from the contract and which is not arbitrable.

Because neither the failure of the employer nor the union to perform fully is a material breach of contract, excusing the performance of the other, a collective bargaining agreement is not an executory contract in bankruptcy under Professor Countryman's definition. The impossibility of creating a material breach of a collective bargaining agreement is consistent with the Supreme Court's refusal to let rights under a collective bargaining agreement expire, even when the contract itself expires or is otherwise terminated. *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977); *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

Professor Countryman, in his section on collective bargaining agreements, simply calls them executory and does not ask the question whether or not collective bargaining agreements do, in fact, meet his definition. Countryman, *Executory Contracts in Bankruptcy: Part II*, 58 *Minn. L. Rev.* 479, 492 (1974). In creating his definition of executory contract, Professor Countryman sets up three categories of contracts: (1) those in which the nonbankrupt party has performed fully; (2) those in which the bankrupt party has performed fully; and (3) those in which neither party has performed fully. He does not create a fourth category, however, for those contracts where no material breach will occur even if one party fails to perform. He does conclude that "a contract so nearly performed by the nonbankrupt party that failure to complete performance would not be sufficiently material to excuse performance by the bankrupt should not be treated as an executory contract in bankruptcy." Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 *Minn. L. Rev.* 439, 457-58 (1973). This description comes close to describing the legal incidents of a collective bargaining agreement.

The difficulty with the concept of executory versus nonexecutory in the labor context is that the Court has so protected collective bargaining agreements under the common law of § 301 that a collective bargaining agreement can never be considered executed until it expires. It functions much as a statute passed by a legislature; it governs the conduct of employer and employee until it is replaced by a new contract or is repealed when the rules expire. Legal language can be manipulated to fit a collective bargaining agreement into some definition of "executory contract," but these definitions fail to capture the essence of the collective bargaining agreement. The inability to apply the material breach doctrine to collective bargaining agreements simply illustrates again their uniqueness as a long-term, governmental-type regulation of the work place.

54. In the few instances in which a court has ruled that a collective bargaining agreement was not an executory contract, the collective bargaining agreement had already expired by its own terms. *Gloria Mfg. Corp. v. ILGWU*, 734 F.2d 1020 (4th Cir. 1984); *In re Pesce Baking Co.*, 43 Bankr. 949, 957 (Bankr. N.D. Ohio, 1984). The one substantive discussion of whether any future performance remains due by both parties under a collective bargaining agreement is contained in *In re Total Transp. Serv.*, 37 Bankr. 904 (Bankr. S.D. Ohio, 1984), in which the court held that the collective bargaining agreement was no longer executory because the debtor had closed its business and no employees continued to be employed under the collective bargaining agreement. Therefore, no future performance was due by either the employer or employees. *Id.* at 906.

The issue of whether a collective bargaining agreement is an executory contract was not actually litigated in *Bildisco* because the parties conceded that the agreement was executory. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 521-22 (1984). Only one amicus brief, that of the United Mine Workers, contested the issue. The Mine Workers contended that a collective bargaining agreement is not an executory contract because it primarily contains unilateral promises by the employer and lacks the mutuality of future performance required by the definition. For example, an employer's promise to follow seniority in job assignments is unilateral, depending in no sense on any future performance by the union. In addition, many of the promises the employer makes in a collective bargaining agreement are for the payment of benefits after the employees have fully performed the services for which they are being paid, such as the employer's promise to continue to pay health benefits for retired and laid-off employees. Brief for the United Mine Workers at 6-7, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522 n.6 (1984).

In finding that collective bargaining agreements are executory contracts under § 365, the Supreme Court accepted the bankruptcy definition as a contract "on which performance is due to some extent on both sides." The Court found that under the labor agreement between *Bildisco* and the union, both "had reciprocal obligations, and at any point during the life of the contract, performance was due by both parties." 465 U.S. 513, 522 n.6. The Court, however, did not specify what that performance was, and, in particular, did not indicate what performance was still due by the union.

In fact, the contract between *Bildisco* and the Teamsters Union did not contain an express no-strike promise by the union, normally the only obligation imposed on the union by a collective bargaining agreement. See Labor Contract between *Bildisco* and Teamsters Local 408, reprinted in Joint Appendix at 78-115, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). Thus, one could argue that no performance at all remained due by the union in *Bildisco*. Under federal

Assuming a collective bargaining agreement is an executory contract, section 365 provides that a trustee or debtor in possession "may assume or reject any executory contract" subject to the approval of the bankruptcy court.⁵⁵ The debate over rejection of collective bargaining agreements draws its significance from the different treatment and priorities afforded various types of claims under bankruptcy law.⁵⁶ First priority is given to claims for administrative expenses, including employee wage and benefit claims based on services rendered after the bankruptcy petition is filed and during the administration of the bankruptcy estate.⁵⁷ Although these wage and benefit claims are entitled to first priority whether or not the collective bargaining agreement is rejected, rejection of the contract may result in such

labor law principles, however, the Supreme Court has held that a no-strike promise by the union may be implied from a contract's arbitration provision. See *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 382 (1974); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962). Thus, if the Court had discussed the issue in *Bildisco*, it may have implied a no-strike promise from the wording of the arbitration clause, § 22, and from two references in the contract to the union's right to call a work stoppage upon the occurrence of specific breaches by the employer during the term of the contract. See *Labor Contract between Bildisco and Teamsters Local 408*, §§ 1, 13, 22. The Court's eagerness to imply a no-strike promise makes it largely irrelevant whether the collective bargaining agreement actually contains a no-strike clause. As another example of a collective bargaining agreement's departure from ordinary contract law, examining the terms of the contract to determine the future obligations of the parties is not always appropriate for collective bargaining agreements. Because important obligations are imposed by law, not contract, one cannot look at the written document itself to discover whether or not performance remains due by both parties in order to decide if the contract is executory.

By creating the new § 1113 on collective bargaining agreements in 1984, Congress has removed most of the bankruptcy cases involving collective bargaining agreements from § 365 and its language on executory contracts. The question is not entirely moot, however, because the 1984 amendments on collective bargaining agreements were *not* incorporated into the Bankruptcy Code's Chapter 9 on municipal bankruptcy. Chapter 9 does incorporate § 365, so the status of a collective bargaining agreement with a municipality will continue to be litigated under § 365. See 11 U.S.C.A. § 901(a) (West Supp. 1985). § 901(a) lists the sections of title 11 that apply to municipal bankruptcies. § 365 is included in this list; § 1113 is not.

55. 11 U.S.C. § 365(a) (1982). If the debtor rejects or renounces the contract, the debtor is no longer bound by it, but the other contracting party may claim damages for breach. This breach relates back in time and is deemed to have occurred on the day before the debtor filed bankruptcy. See 11 U.S.C. § 365(g).

If the debtor assumes the contract, it ratifies, confirms, and adopts the contract, assuming all liabilities under the contract which exist as of the date of assumption. See 2 L. KING, COLLIER ON BANKRUPTCY ¶¶ 365.01, 365.03 (15th ed. 1979).

56. This article will not attempt an exhaustive discussion of the correct priorities to be given to various claims resulting from breach of a collective bargaining agreement. A brief discussion is necessary, however, because uncertainty or erroneous assumptions about the possible priority a given collective bargaining agreement claim will receive seems to have prompted rejection of the collective bargaining agreement in several cases. See, e.g., *In re Alan Wood Steel Co.*, 449 F. Supp. 165 (E.D. Pa. 1978); *In re Salt Creek Freightways*, 47 Bankr. 835, 842 n.2 (Bankr. D. Wyo. 1985); *In re Gray Truck Line Co.*, 34 Bankr. 174, 179 (Bankr. M.D. Fla. 1983); *In re Concrete Pipe Mach. Co.*, 28 Bankr. 837, 839 (Bankr. N.D. Iowa 1983); *In re Braniff Airways, Inc.*, 25 Bankr. 216, 220-21 (Bankr. N.D. Tex. 1982). See also the discussion of *Bildisco*, *infra* notes 163-64 and accompanying text.

57. The "expenses of preserving the estate, including wages . . . for services rendered after the commencement of the case" are administrative expenses, 11 U.S.C. § 503(b)(1)(A) (1982), entitled to first priority in a plan of reorganization, 11 U.S.C. § 507(a)(1) (1982). Whether the contract is assumed or rejected, only employee claims for wages and benefits due for services actually rendered during administration are entitled to first priority. *In re Mammoth Mart*, 536 F.2d 950 (1st Cir. 1976); *In re Staus-Duparquet, Inc. v. Local Union No. 3*, 386 F.2d 649 (2d Cir. 1967); *In re Public Ledger, Inc.*, 161 F.2d 762 (3d Cir. 1947) (contract assumed by continued employment in accord with its terms; nevertheless, administrative priority given only to claim for benefits based on postpetition employment, not those due as a result of prepetition service); *In re Cott Corp.*, 47 Bankr. 487 (Bankr. D. Conn. 1984) (even though collective bargaining agreement rejected, that part of pension plan withdrawal liability attributable to postpetition services of employees is entitled to administrative expense priority); *In re Price Chopper Supermarkets*, 19 Bankr. 462 (Bankr. S.D. Cal. 1982) (even though the collective bargaining agreement was rejected, employees are still entitled to administrative expense priority for the fair market value of wages and benefits earned during administration); *In re Schatz Fed. Bearings Co.*, 5 Bankr. 549, 553 (Bankr. S.D.N.Y. 1980) (even though collective bargaining agreement was expressly assumed with court approval, only vacation pay based on actual postpetition service is entitled to administrative priority). Whether a claim is entitled to administrative expense priority is determined under § 503 of the Code, not under § 365 on rejection.

administrative claims being valued at a lower rate.⁵⁸ If a contract is rejected, all contract claims *not* entitled to administrative expense treatment become unsecured claims entitled to lower or no priority. Rejection constitutes breach of the contract, and this breach relates back in time to the date immediately before the bankruptcy petition was filed.⁵⁹ Consequently, claims for breach of a rejected contract become prepetition unsecured claims. Prepetition unsecured claims for wages or benefits are entitled to third or fourth priority.⁶⁰ Other types of unsecured contract claims receive no priority. The lower the priority, the less likely the creditor will recover any of its claim; the greater the amount of administrative expense claims, the less money or assets available for paying lower priority claims.

Prior to 1984, the only explicit reference to collective bargaining agreements in the Bankruptcy Code was found in section 1167, which prohibits a bankruptcy court or trustee from making any changes in the wages or working conditions of railroad employees who work under a collective bargaining agreement negotiated under the Railway Labor Act.⁶¹ Employers argued that because collective bargaining agree-

58. The expenses of administration are generally set according to the reasonable or fair market value of the services rendered or the benefit accorded to the estate. See 3 L. KING, *COLLIER ON BANKRUPTCY* ¶ 503.04 (15th ed. 1979); *In re United Cigar Stores Co.*, 69 F.2d 513, 515 (2d Cir. 1934); *In re Chakos*, 24 F.2d 482, 486 (7th Cir. 1928); *Oscar Heineman Corp. v. Nat Levy & Co.* 6 F.2d 970, 971 (2d Cir. 1925). See also *Diversified Serv. v. Harralson*, 369 F.2d 93, 95 (5th Cir. 1966) ("Nor can the appropriate rent be limited by the amount that the Referee feels the estate can 'afford to pay'—to do so would be to confer on general creditors an advantage obtained after bankruptcy at the expense of the landowner."). When the services or benefit are provided under a contract or lease agreement, the rate set forth in the contract or lease is generally regarded as setting the reasonable value. See 3 KING, *supra*, ¶ 503.04; *In re Unishops, Inc.*, 553 F.2d 305 (2d Cir. 1977); *In re Wil-low Cafeterias*, 71 F. Supp. 685 (S.D.N.Y. 1939).

Even when a contract or lease is rejected, courts have held that the lease or contract sets the reasonable value for determining the amount of the administrative expenses. See, e.g., *In re Fred Sanders Co.*, 22 Bankr. 902, 907 (Bankr. E.D. Mich. 1982); *In re Merchants Storage Co.*, 15 Bankr. 448, 452 (Bankr. E.D. Va. 1981); *In re Dunwoody Village Sporting Goods*, 11 Bankr. 493, 494–95 (Bankr. N.D. Ga. 1981); *In re Keyboard Center*, 9 Bankr. 472, 474 (Bankr. D. Conn. 1981); *In re Standard Furniture Co.*, 3 Bankr. 527, 530 (Bankr. S.D. Cal. 1980). Before § 1113 became effective in 1984, employers were allowed to reduce wages immediately and to eliminate employee benefits when filing bankruptcy. There are no reported cases, however, where unions or employees have asserted claims for administrative expenses based on the difference between the reduced wages or benefits and the rejected contract's wage or benefit rates. The courts and litigants seem to have assumed that once the debtor makes unilateral reductions in pay, any claims for administrative expenses based on the difference between the contract rate and the actual wages received are precluded.

It appears to be an open question whether rejection of a collective bargaining agreement does in fact preclude employees from claiming administrative expenses on the basis of the contract rate.

59. See 11 U.S.C. § 365(g)(1) (1982).

60. Any prepetition employee claims for wages, vacation pay, severance pay, and sick pay are entitled to third priority if earned within 90 days of filing bankruptcy. 11 U.S.C. § 507(a)(3) (1982). Employee claims for employer contributions to employee benefit plans are entitled to fourth priority. 11 U.S.C. § 507(a)(4) (1982). The combination of third priority wage claims and fourth priority benefit plan claims cannot exceed a \$2000 limit per employee. 11 U.S.C. §§ 507(a)(3) and (4) (1982). Rejection of a collective bargaining agreement should not affect wages and benefit claims, however, because, if earned postpetition, they are administrative expense claims regardless of rejection.

61. 11 U.S.C. § 1167 (1982). Section 1167 applies only to railroad employees. It is a part of Chapter 11's Subchapter IV on railroad reorganization. Section 103(g) of Title 11 specifies that this subchapter only applies to railroads. Furthermore, § 1167 is based on § 77(n) of the repealed Bankruptcy Act, former 11 U.S.C. § 205(n), which explicitly provided that no trustee could change the wages or working conditions of railroad employees. Therefore, this section has not protected other collective bargaining agreements negotiated under the Railway Labor Act, such as those of airline employees. In his article on rejection of collective bargaining agreements, Pulliam has taken the position that § 1167 protects all contracts negotiated under the Railway Labor Act, not just railroad contracts. Pulliam, *The Rejection of Collective Bargaining Agreements Under Section 365 of the Bankruptcy Code*, 58 AM. BANKR. L.J. 1, 10, 14–15, 38 (1984). This conclusion, however, is at odds with current interpretations of both former § 77(n) and present § 1167. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522–23 n.8 (1984); *Brotherhood of Ry., Airline & S.S. Clerks v. REA Express*, 523 F.2d 164, 169, nn.3–4 (2d Cir. 1975); *In re Air Florida Sys.*, 48 Bankr. 440 (Bankr. S.D. Fla. 1985); *In*

ments covering other employees were not excluded from section 365, by negative implication the Bankruptcy Code allowed such collective bargaining agreements to be rejected.

In contrast to the Bankruptcy Code's lack of any specific language on the collective bargaining agreements of nonrailroad employees, the NLRA explicitly provides that a debtor-in-possession is an employer under the Act and is bound by its unfair labor practice provisions. The definition of "employer" in the NLRA includes any "person," which is defined as including a bankruptcy trustee.⁶² The courts have been unanimous in ruling that the debtor-in-possession, which assumes the same status as a bankruptcy trustee, is an "employer" within the meaning of the NLRA.⁶³

Prior to 1975, there were relatively few cases involving rejection of collective bargaining agreements in bankruptcy.⁶⁴ Employers, or their lawyers, may have generally assumed that because of section 8(d), added to the NLRA in 1947, it was not possible to terminate such contracts in bankruptcy.⁶⁵ Perhaps employers were

re Braniff Airways, 25 Bankr. 216, 217 (Bankr. N.D. Tex. 1982); Note, *America's Airlines Discover Chapter 11: Is it Reorganization or Union-Busting?*, 11 J. CONTEMP. L. 375, 382 (1984).

62. Section 2 of the NLRA provides, in part:

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, *trustees in cases under Title 11*, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly[.]

29 U.S.C.A. § 152(1) and (2) (West Supp. 1985) (emphasis added). See *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39 (3d Cir. 1942), in which the court held:

[A] debtor in possession is responsible for the unfair labor practices which occur during a reorganization. Its status as an employer is no different, so far as the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., is concerned, than that of any other employer. Court supervision of corporate reorganization affords the operating possessor no freedom from its statutory duty to its employees.

Id. at 43.

63. The Supreme Court so acknowledged in *Bildisco*, 465 U.S. 513, 528. See also *Local Joint Executive Bd. v. Hotel Circle*, 613 F.2d 210, 215 (9th Cir. 1980); *NLRB v. Bachelder*, 120 F.2d 574, 576 (7th Cir.), *cert. denied*, 314 U.S. 647 (1941); *Burgmeyer Bros.*, 254 N.L.R.B. 1027 (1981); *Oxford Structures, Ltd.*, 245 N.L.R.B. 1180, 1183 (1979); and *infra* note 107.

64. Only six cases involving rejection of collective bargaining agreements were reported before 1975. Rejection was granted in three of them: *In re Business Supplies Corp.*, 72 Lab. Cas. (CCH) ¶ 13,940 (S.D.N.Y. 1973); *Carpenter's Local No. 2746 v. Turney Wood Prod.*, 289 F. Supp. 143 (W.D. Ark. 1968); and *In re Klaber Bros.*, 173 F. Supp. 83 (S.D.N.Y. 1959). Rejection was denied in three: the lower court opinion in *Shopmen's Local Union No. 455 v. Kevin Steel Prod.*, 381 F. Supp. 336 (S.D.N.Y. 1974); *In re Overseas Nat'l Airways*, 238 F. Supp. 359 (E.D.N.Y. 1965); and *In re Mamie Conti Gowns*, 12 F. Supp. 478 (S.D.N.Y. 1935). See also *Countryman*, Part II, *supra* note 53, at 492-96 (1974); Comment, *Collective Bargaining and Bankruptcy*, 42 S. CAL. L. REV. 477 (1969).

In a seventh case, *In re Public Ledger, Inc.*, 161 F.2d 762 (3d Cir. 1947), the court assumed a collective bargaining agreement could be rejected, but the issue litigated concerned assumption of the contract and the priorities to be accorded vacation and severance pay. An eighth case, *Designer's Guild of Ladies Apparel, Local 30 v. Hers Apparel Indus.*, 88 L.R.R.M. (BNA) 3254 (S.D.N.Y. 1975), discussed rejection of a collective bargaining agreement but avoided a ruling, holding that the two individual contracts of employment in question, entered into under the auspices of a collective bargaining agreement, were severable from it and could be rejected separately as individual employment contracts.

There is also one early case discussing wage agreements under the Railway Labor Act (RLA) which held that a bankruptcy receiver could not reduce wages unilaterally without complying with the negotiation and mediation procedures of the RLA. *Burke v. Morphy*, 109 F.2d 572 (2d Cir. 1940).

In contrast to these relatively few cases, 36 cases involving rejection of collective bargaining agreements were reported from 1975 until the Supreme Court's opinion in *Bildisco* in 1984. See *infra* note 72.

65. It is interesting that neither of the two articles published before 1975 discussing rejection of collective bargaining agreements under the Bankruptcy Act mentioned § 8(d) of the NLRA and its possible conflict with the bankruptcy provisions. See *Countryman*, Parts I and II, *supra* note 53, and Comment, *supra* note 64. The earliest reference to the NLRA's prohibition on midterm contract termination appears in the district court's opinion in the *Kevin Steel* case in 1974. 381 F. Supp. 336, 338.

Professor James White states in his recent article on *Bildisco* and the 1984 bankruptcy amendments that "it was well known that section 365 would apply . . . to collective bargaining agreements" and that the section "seems to have

simply not willing to risk a strike by their employees if the collective bargaining agreement was rejected.⁶⁶

The present use of bankruptcy law to abrogate collective bargaining agreements began in 1975 with the decision of the Second Circuit Court of Appeals in *Shopmen's Local Union No. 455 v. Kevin Steel Products*.⁶⁷ For the first time, a court of appeals was confronted with the argument that the bankruptcy court's approval of rejection of a collective bargaining agreement conflicted directly with section 8(d)'s prohibition of unilateral termination of a collective bargaining agreement.⁶⁸ In resolving the conflict between these two coequal areas of federal law, the Second Circuit found that bankruptcy law should take precedence over the labor statute and ruled that collective bargaining agreements could be rejected in bankruptcy without regard to section 8(d).⁶⁹

caused little controversy in the past." White, *The Bildisco Case and the Congressional Response*, 30 WAYNE L. REV. 1169, 1171, nn.7-8 (1984). His sources indicate, however, that only the few cases already cited, see *supra* note 64, discussed the issue before 1975. Furthermore, his quotations from the legislative history of the 1976 municipal bankruptcy amendments suggest that Congress' realization of the conflict between the NLRA and the Bankruptcy Code over the rejection of collective bargaining agreements began with the Second Circuit's opinion in *Kevin Steel*. *Id.* at 1171 n.8, quoting from 122 CONG. REC. 7972 (1976).

66. See *Shopmen's Local Union No. 455 v. Kevin Steel Prod.*, 519 F.2d 698, 703 (3d Cir. 1975); *In re Public Ledger, Inc.*, 161 F.2d 762, 766-67 (3d Cir. 1947).

As long as a collective bargaining agreement containing an express or implied no-strike clause remains in effect, a strike over an issue which may be arbitrated under the contract is a breach of the contract and may be enjoined. *Boys Mkts. v. Retail Clerks Local 770*, 398 U.S. 235 (1970). Once the contract is terminated, however, the employees are free to strike and the federal courts have no jurisdiction to enjoin the strike. See the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (1982).

Furthermore, if the strike occurs during bankruptcy, the courts may not enjoin the strike, even if the strike is for the purpose of collecting a prepetition debt by forcing the debtor to pay back wages or benefits. See *Briggs Transp. Co. v. International Bhd. of Teamsters*, 739 F.2d 341 (8th Cir.), cert. denied, 105 S. Ct. 295 (1984); *In re Crowe & Assoc.*, 713 F.2d 211 (6th Cir. 1983); *In re Petrusch*, 14 Bankr. 825 (N.D.N.Y. 1981); *In re Catamount Dyers*, 24 Bankr. 59 (Bankr. D. Vt. 1982); *In re Tom Powell & Son*, 22 Bankr. 657 (Bankr. W.D. Mo. 1982).

67. 519 F.2d 698 (2d Cir. 1975).

68. See text of § 8(d), *supra* note 48. The facts of *Kevin Steel* are unusual in that the company was seeking to reject a contract it had never signed, but which the National Labor Relations Board (NLRB) had ordered it to sign. This was the first case involving rejection in which company was embroiled in NLRB unfair labor practice proceedings before bankruptcy was filed, thus leading to a direct conflict between the NLRA and the Bankruptcy Act.

The long sequence of events in *Kevin Steel* began in 1973. Kevin Steel's contract with the Shopmen's Union was due to expire on June 30, 1973. In February, the employees went on strike in response to the employer's failure to make its required pension fund contributions. After one week, the company made the payments and the employees called off the strike, but the company refused to allow the employees to return to work. 381 F. Supp. 336, 337. Nevertheless, in May 1973 the union began negotiating with the company for a new contract. As alleged by the union and found by the NLRB, the union and the company reached an interim agreement to extend the old contract until a new agreement was reached between the same union and an association of steel industry employers in the area. The union and the company were then to adopt the same contract as that negotiated with the association. *Kevin Steel Prod.*, 209 N.L.R.B. 493, 497-98 (1974). When the union asked the company to sign the document embodying this interim agreement, the company refused. The company later refused to sign a new collective bargaining agreement based on the union's agreement with the association reached in July, 1973. *Id.* at 498-99. The union filed unfair labor practice charges; a complaint was issued by the NLRB General Counsel, and subsequently heard by an administrative law judge in August, 1973. In September, 1973, Kevin Steel filed its bankruptcy petition seeking an arrangement under Chapter 11. 519 F.2d 698, 700. The administrative law judge issued his recommended order in November, 1973, finding Kevin Steel guilty of an unfair labor practice for refusing to sign the interim agreement with the union. The NLRB adopted the administrative law judge's recommendation on March 8, 1974, ordering the company to sign the interim agreement and the subsequently negotiated collective bargaining agreement. 209 N.L.R.B. 493, 500.

At some point, Kevin Steel petitioned the bankruptcy court for rejection of the collective bargaining agreement, which apparently it had never voluntarily signed. The bankruptcy court granted the rejection petition, also in March of 1974, but the district court judge later reversed the rejection order. 381 F. Supp. 336, 338. Kevin Steel appealed the district judge's reversal of rejection, and the NLRB petitioned the Second Circuit for enforcement of its order; the two cases were consolidated by the Second Circuit. 519 F.2d 698, 700-01.

69. The Court of Appeals relied on two Supreme Court cases in which, the bankruptcy context, the Court had

Soon after *Kevin Steel*, the Second Circuit Court of Appeals issued a second decision, *Brotherhood of Railway Airline and Steamship Clerks v. REA Express*,⁷⁰ allowing rejection of a collective bargaining agreement negotiated under the Railway Labor Act.⁷¹ This pair of opinions triggered a long line of cases involving rejection of collective bargaining agreements.⁷² By 1984, three other circuits had joined the

interpreted the word "wages" in a literal fashion to exclude fringe benefits, even though this narrow reading conflicted with the meaning of "wages" under labor law. See *United States v. Embassy Restaurant*, 359 U.S. 29 (1959) (employer contributions to welfare fund were not "wages" entitled to priority in bankruptcy); *Joint Indus. Bd. of Elec. Indus. v. United States*, 391 U.S. 224 (1968) (employer contributions to annuity plans were not "wages"). It is interesting to note that the Supreme Court's narrow interpretation of the term "wages," adopted in *Kevin Steel*, was reversed by Congress when it passed the Bankruptcy Reform Act of 1978, the new Bankruptcy Code. The legislative history of 11 U.S.C. § 507(a)(4), giving a fourth priority to contributions to employee benefit plans, specifies that § 507(a)(4) "overrules *United States v. Embassy Restaurant*." S. REP. NO. 989, 95th Cong., 2nd Sess. 69, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5855.

The *Kevin Steel* court also pointed to the fact that the Bankruptcy Act exempted railroad employees' collective bargaining agreements from rejection, implying a Congressional intent not to exclude other collective bargaining agreements from rejection. See § 77(n) of the Bankruptcy Act, former 11 U.S.C. § 205(n) (now § 1167 of the Code). 519 F.2d 698, 704-05.

In addition to ruling that Congress intended the Bankruptcy Act to circumscribe § 8(d), the Second Circuit propounded an alternative theory in order to avoid any conflict whatsoever with § 8(d)—its "new entity" theory. *Id.* at 704. The court explained that under bankruptcy law, when an employer files bankruptcy, it becomes a debtor-in-possession, a new entity with specified rights and duties subject to the supervision of the bankruptcy court. As a debtor-in-possession, the employer is not the same entity as the prebankruptcy employer, but a different entity created by the bankruptcy proceedings. The court found that, although this new entity is bound by the obligations of the NLRA to bargain in good faith for a new contract, it is not a party to nor bound by the old contract, and, consequently, is not bound by the termination prohibitions or the termination procedures of § 8(d): "Until the debtor here assumes the old agreement or makes a new one, it is not a 'party' under section 8(d) to any labor agreement with the union and is simply not subject to the termination restrictions of the section." *Id.* at 704.

70. 523 F.2d 164 (2d Cir. 1975).

71. The Railway Labor Act is codified at 45 U.S.C. §§ 151-188 (1982).

72. By February, 1984, there were at least 34 reported cases on rejection of collective bargaining agreements decided since *Kevin Steel* and *REA Express* in 1975. Rejection was granted or affirmed in 24 cases: *Borman's, Inc. v. Allied Supermarkets*, 706 F.2d 187 (6th Cir. 1983) (rejection was opposed only by business competitors, not the union), *aff'g*, 6 Bankr. 968 (E.D. Mich. 1980), *cert. denied*, 464 U.S. 908 (1983); *In re Brada Miller Freight Sys.*, 702 F.2d 890 (11th Cir. 1983); *In re Bildisco*, 682 F.2d 72 (3d Cir. 1982), *aff'd*, 465 U.S. 513 (1984); *Local Joint Executive Bd. v. Hotel Circle*, 613 F.2d 210 (9th Cir. 1980); *In re Alan Wood Steel Co.*, 449 F. Supp. 165 (E.D. Pa. 1978); *Bohack Corp. v. Truck Drivers Local Union No. 807*, 431 F. Supp. 646 (E.D.N.Y. 1977); *In re Parrot Packing Co.*, 42 Bankr. 323 (N.D. Ind. 1983); *In re Handy Andy*, 112 L.R.R.M. (BNA) 2657 (W.D. Tex. 1983); *In re Ryan Co.*, 83 Lab. Cas. (CCH) ¶ 10,487 (D. Conn. 1978); *In re Penn Fruit*, 92 L.R.R.M. (BNA) 3548 (E.D. Pa. 1976); *In re Rath Packing Co.*, 36 Bankr. 979 (Bankr. N.D. Iowa 1984); *In re Gray Truck Line Co.*, 34 Bankr. 174 (Bankr. M.D. Fla. 1983); *In re Concrete Pipe Mach. Co.*, 28 Bankr. 827 (Bankr. N.D. Iowa 1983); *In re J.R. Elkins, Inc.*, 27 Bankr. 862 (Bankr. E.D.N.Y. 1983); *In re Commercial Motor Freight*, 27 Bankr. 293 (Bankr. S.D. Ind. 1983); *In re Braniff Airways*, 25 Bankr. 216 (Bankr. N.D. Tex. 1982); *In re U.S. Truck Co.*, 24 Bankr. 853 (Bankr. E.D. Mich. 1982); *In re Southern Elec. Co.*, 23 Bankr. 348 (Bankr. E.D. Tenn. 1982); *In re Hoyt*, 27 Bankr. 13 (Bankr. D. Or. 1982); *In re Yellow Limousine Serv.*, 22 Bankr. 807 (Bankr. E.D. Pa. 1982); *In re Reserve Roofing Fla.*, 21 Bankr. 96 (Bankr. M.D. Fla. 1982); *In re Ateco Equip.*, 18 Bankr. 915 (Bankr. W.D. Pa. 1982); *In re Allied Technology*, 8 Bankr. 366 (Bankr. S.D. Ohio 1980). *In re Blue Ribbon Transp. Co.*, 30 Bankr. 783 (Bankr. R.I. 1983), the court granted rejection, but only on condition that management first reduce its salaries and benefits within five days of the court's order. *Id.* at 788.

In two additional cases, *In re Letterman*, 29 Bankr. 351 (Bankr. E.D. Cal. 1983), and *In re Price Chopper Supermarkets*, 19 Bankr. 462 (Bankr. S.D. Cal. 1982), rejection was deemed to have occurred automatically sixty days after conversion from Chapter 11 to Chapter 7.

Rejection of a collective bargaining agreement was reversed or denied in 8 cases: *In re Figure Flattery*, 88 Lab. Cas. (CCH) ¶ 11,850 (S.D.N.Y. 1980); *In re Maverick Mining Corp.*, 36 Bankr. 837 (Bankr. W.D. Va. 1984); *In re Kirkpatrick*, 34 Bankr. 767 (Bankr. 9th Cir. 1983); *In re Tinti Const. Co.*, 29 Bankr. 971 (Bankr. E.D. Wis. 1983); *In re Miles Machinery Co.*, 113 L.R.R.M. (BNA) 3114 (Bankr. E.D. Mich. 1982); *In re Louis F. Sammarco Elec. Co.*, 109 L.R.R.M. (BNA) 3288 (Bankr. W.D. Tenn. 1982); *In re David A. Rosow, Inc.*, 9 Bankr. 190 (Bankr. D. Conn. 1981); *In re Connecticut Celery Co.*, 106 L.R.R.M. (BNA) 2847 (Bankr. D. Conn. 1980).

In one additional case, *In re St. Croix Hotel Corp.*, 18 Bankr. 375 (Bankr. D.R.I. 1982), the court denied the debtor's request to reject its duty to bargain with the union; no collective bargaining agreement between the parties was then in effect.

Second Circuit in ruling that either the Bankruptcy Act or the Code took precedence over section 8(d) and allowed rejection of collective bargaining agreements.⁷³ No federal court disagreed.

The only issue which remained in dispute among the circuits was the standard a bankruptcy court should use in approving rejection of a collective bargaining agreement.⁷⁴ Both *Kevin Steel* and *REA Express* recognized that a collective bargaining agreement was not an ordinary contract. The standard of rejection developed by the courts and used to determine whether various commercial contracts should be rejected is called the "business judgment test."⁷⁵ Because of national labor policy under section 301 and the contract's protection under section 8(d), the courts agreed the business judgment test was not appropriate.⁷⁶ The courts could not agree,

73. The Ninth Circuit in 1980, in *Local Joint Executive Bd. v. Hotel Circle*, 613 F.2d 210 (9th Cir. 1980), the Third Circuit in 1982, in *In re Bildisco*, 682 F.2d 72 (3d Cir. 1982), and the Eleventh Circuit in 1983, in *In re Brada Miller Freight Sys.*, 702 F.2d 890 (11th Cir. 1983).

74. For discussion of the standard to be used in rejecting collective bargaining agreements, see Pulliam, *supra* note 61; Bordewick and Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 AM. BANKR. L.J. 293 (1983); *Eighth Circuit Survey: The Accommodation of the Bankruptcy and Labor Acts in Chapter 11 Reorganizations*, 16 CREIGHTON L. REV. 859 (1983); Note, *Kevin Steel and REA Express Revisited: When Is a Collective Bargaining Agreement Burdensome?*, 56 TEMP. L.Q. 252 (1983); Note, *The Labor-Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement*, 80 MICH. L. REV. 134 (1981); Note, *The Bankruptcy Law's Effect on Collective Bargaining Agreements*, 81 COLUM. L. REV. 391 (1981); Note, *Rejection of Collective Bargaining Agreements As Executory Contracts in Bankruptcy—Receiver's Authority to Unilaterally Assume or Adopt Collective Bargaining Agreements*, 27 WAYNE L. REV. 1601 (1981); Note, *Rejection of Collective Bargaining Agreements in Chapter XI Arrangement Proceedings*, 17 B.C. INDUS. & COM. L. REV. 192 (1976); Comment, *Rejection of Collective Bargaining Agreements by Trustees in Bankruptcy*, 81 DICK. L. REV. 64 (1976); Note, *Executory Labor Contracts and Municipal Bankruptcy*, 85 YALE L.J. 957 (1976); Note, *Rejection of Collective Bargaining Agreements as Executory Contracts in Bankruptcy*, 22 WAYNE L. REV. 165 (1975).

75. The power to reject executory contracts in bankruptcy has existed since the enactment of the Bankruptcy Act in 1898. See §§ 70(b), 313, 413, 613 of the Bankruptcy Act, now repealed, former 11 U.S.C. §§ 110(b), 713, 813, 1013. The bankruptcy trustee's ability to reject a contract arose out of the historical right of the trustee to abandon property that was burdensome to the bankruptcy estate. 2 L. KING, *COLLIER ON BANKRUPTCY* ¶ 365.01[1] (15th ed. 1979).

The "burdensome" test, first used to govern rejection, was defined in *American Brake Shoe & Foundry Co. v. New York Rys. Co.*, 278 F. 842 (S.D.N.Y. 1922), as allowing rejection of a contract which resulted in "a positive loss or encroachment on the corpus or capital of the estate." *Id.* at 843. The "burdensome" standard, requiring an actual loss by the estate before rejection could be approved, was eventually rejected in favor of the more lenient "business judgment" test, adopted by the Supreme Court in *Group of Inst. Investors v. Chicago, Mil., St. P. & Pac. R.R.*, 318 U.S. 523 (1943). The Court rejected the argument "that only burdensome leases may be rejected" and held that "the question of whether a lease should be rejected . . . is one of business judgment." *Id.* at 549-50 (emphasis in original). Under this test, even a profitable commercial contract may be rejected if a more profitable arrangement is possible. See King, *supra*, at ¶ 365.03.

76. See *Brotherhood of Ry., Airline & S.S. Clerks v. REA Express*, 523 F.2d 164, 169 (2d Cir. 1975); *Shopmen's Local Union No. 455 v. Kevin Steel Prod.*, 519 F.2d 698, 707 (2d Cir. 1975). Under the "business judgment" test, rejection of a collective bargaining agreement is certain to be approved. Few, if any, employers regard a collective bargaining agreement as a benefit to the estate. Instead, a collective bargaining agreement is a limitation on an employer's freedom to conduct its business in light of its own business judgment. Furthermore, if the contract's wage rate exceeds \$3.35 per hour, it is always a burden in that it obligates the employer to pay more than it is obligated to pay by the federal minimum wage law. See 29 U.S.C. § 206(a)(1) (1982). An employer's motivation to enter into a collective bargaining agreement is not the profit incentive, but the obligation to bargain imposed by the NLRA and the anticipation of a disruptive strike if the employer refuses to reach agreement. The primary profit an employer reaps from a collective bargaining agreement is industrial peace and the presumed noninterruption of its business during the contract's term guaranteed by the union's promise not to strike. Employers' motivation to enter into or preserve collective bargaining agreements may have declined significantly as a result of the recession of the 1980s because unions have been very reluctant to call strikes. See *supra* note 6. In today's economy, an employer's business judgment would probably tell it to reject a collective bargaining agreement as burdensome if that will enable it to reduce its labor costs and expand its freedom to reorganize its workforce while facing a minimal strike risk. On the other hand, perhaps the recent strike of the Wheeling-Pittsburgh Steel Corp. by the Steelworkers Union, called as soon as the bankruptcy court approved rejection

however, on an alternative standard. The *Kevin Steel* court adopted a "balancing of the equities" standard from a previous case involving rejection of a collective bargaining agreement,⁷⁷ whereas the *REA Express* court developed a more stringent standard.⁷⁸

The first case to reach the courts of appeal on rejection of a collective bargaining agreement under the new Bankruptcy Code was *In re Bildisco*,⁷⁹ decided by the Third Circuit Court of Appeals in June 1982. With a few differences, the facts of *Bildisco* generally followed the scenario outlined above.⁸⁰ Beginning in January 1980 the employer, Bildisco & Bildisco, failed to meet its obligations under its contract with the Teamsters Union: it stopped making health and pension benefits payments and stopped remitting to the union the dues withheld from employees' wage payments. The employer filed its bankruptcy petition under Chapter 11 in April, 1980. In May 1980 Bildisco refused to begin paying a wage increase scheduled to go into effect under the collective bargaining agreement. The union filed an unfair labor practice charge under section 8(d) with the NLRB in June, claiming that Bildisco was unilaterally modifying the contract. In January 1981 Bildisco moved orally at a bankruptcy hearing to reject the union contract. The bankruptcy court approved

of the collective bargaining agreement, reflects a reversal in the decline of strikes and will give employers greater incentive to maintain their collective bargaining agreements. See Wall St. J., July 22, 1985, at 3, col. 1.

At least one bankruptcy court disagrees with the assumption that all collective bargaining agreements burden the estate. The court in *In re Pesce Baking Co.*, 43 Bankr. 949 (Bankr. N.D. Ohio 1984), found this approach too simplistic. "It is more likely that a collective bargaining agreement imposes benefits and burdens alike, on each of the parties." *Id.* at 958. The only benefit to the employer that the court discusses, however, is the union's promise not to strike. If a contract is rejected and a strike results, "then, with the wisdom of hindsight, the contract may not have seemed so burdensome." *Id.*, quoting *In re C & W Mining Co.*, 38 Bankr. 496, 503 (Bankr. W.D. Ohio 1984). Again, the only incentive for an employer to honor its collective bargaining agreement is to protect itself from a strike, which is a strong or weak incentive depending on the likelihood of the employees actually going on strike.

In *Shopmen's Local Union No. 455 v. Kevin Steel Prod.*, 381 F. Supp. 336 (S.D.N.Y. 1974), *rev'd*, 519 F.2d 693 (2d Cir. 1975), the court rejected as beside the point the NLRB's argument that every employer considers its collective bargaining agreement onerous. This particular employer was suffering sufficient financial distress to justify bankruptcy reorganization and to entitle it to relief from any onerous obligation. The court denied rejection of the collective bargaining agreement, however, based on the contract's protection under the NLRA. *Id.* at 338.

For agreement with the position that all employers regard collective bargaining agreements as onerous and burdensome, see *In re Miles Mach. Co.*, 113 L.R.R.M. (BNA) 3114, 3116 (Bankr. E.D. Mich. 1982); *In re Connecticut Celery Co.*, 106 L.R.R.M. (BNA) 2847 (Bankr. D. Conn. 1980).

77. The court in *Kevin Steel* required the bankruptcy court to "scrutinize with particular care" any application for rejection of a collective bargaining agreement. 519 F.2d 698, 706. The court found that the normal "business judgment" standard was inadequate for collective bargaining agreements: "The decision to allow rejection should not be based solely on whether it will improve the financial status of the debtor." *Id.* at 707. Instead, rejection of a collective bargaining agreement should be permitted "only after thorough scrutiny, and a careful balancing of the equities on both sides[.]" *Id.* at 707, quoting and adopting the standard set forth in *In re Overseas Nat'l Airway*, 238 F. Supp. 359, 361-62 (E.D.N.Y. 1965). Presumably, this "thorough scrutiny" and "balancing of the equities" is to be performed only in the event the bankruptcy court finds the collective bargaining agreement to be "sufficiently burdensome and onerous" to warrant rejection, a finding which was made by the bankruptcy court and specifically affirmed by the court below in *Shopmen's Local Union No. 455 v. Kevin Steel Prod.*, 381 F. Supp. 336, 338 (S.D.N.Y. 1974).

78. The court in *REA Express* held that before rejection may be approved, not only must the court find that the contract is onerous or burdensome and the balance of the equities favors rejection, but the court must find that operating under the collective bargaining agreement "will thwart efforts to save a failing [employer] from collapse." 523 F.2d 164, 169. In other words, a court should authorize rejection "only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the [employer] will collapse and the employees will no longer have their jobs." *Id.* at 172.

79. 682 F.2d 72 (3d Cir. 1982).

80. This summary of the facts is taken from the opinion of the NLRB in *Bildisco & Bildisco*, 255 N.L.R.B. 1203 (1981), and from the Third Circuit's opinion, *In re Bildisco*, 682 F.2d 72, 75 (3d Cir. 1982).

rejection of the collective bargaining agreement ten days later. Eventually, in April 1981 the NLRB issued its decision, ruling that Bildisco had violated section 8(d) beginning in January 1980 by unilaterally altering the terms of the contract.⁸¹ The union appealed the bankruptcy court's order granting rejection, and the NLRB petitioned the Third Circuit Court of Appeals for enforcement of its unfair labor practice order. The cases were consolidated on appeal.

In the first portion of its opinion dealing with rejection, the court agreed with *Kevin Steel* and *REA Express* that collective bargaining agreements could be rejected in bankruptcy.⁸² The court discussed the differing standards governing the rejection decision and chose the *Kevin Steel* "balancing of the equities" standard over the more restrictive *REA Express* "only if the employer will collapse" standard.⁸³ In the second part of its opinion, the court ruled that, in spite of section 8(d) of the NLRA, the employer was permitted to modify or terminate the collective bargaining agreement unilaterally and immediately on filing bankruptcy without waiting for a bankruptcy court to rule on rejection.⁸⁴

B. Rejection in Bildisco

The United States Supreme Court issued its opinion in *NLRB v. Bildisco & Bildisco*⁸⁵ on February 22, 1984. As framed by the Court, the first question in *Bildisco* was "under what conditions a Bankruptcy Court can . . . permit a debtor-in-possession to reject a collective bargaining agreement"?⁸⁶ The Court was unanimous in agreeing with all prior appellate court decisions that Congress intended section 365 to apply to collective bargaining agreements.⁸⁷ The Court pointed out that although section 365 contains special provisions for some types of contracts, such as nonresidential leases,⁸⁸ it makes no special provision for collective bargaining agreements. Of even greater significance to the Court was the fact that Congress in section 1167 exempted the collective bargaining agreements of railroad employees from section 365, but provided no special exemption for any other collective bargaining agreements.⁸⁹ The Court held that section 365, allowing rejection, takes

81. *Bildisco & Bildisco*, 255 N.L.R.B. 1203, 1204-05 (1981). Note that Bildisco committed several unfair labor practices, some before bankruptcy was filed and some after.

82. *In re Bildisco*, 682 F.2d 72, 78 (3d Cir. 1982).

83. In rejecting the *REA Express* standard, the Third Circuit pointed out that it is impossible to predict the future success of a reorganization at the time the rejection decision must be made. Furthermore, the *REA Express* formulation "unduly exalts the perpetuation of the collective bargaining agreement over the more pragmatic consideration of whether the employees will continue to have jobs at all." *Id.* at 80. In reaffirming the standard set forth in *Kevin Steel*, the court specified that the debtor-in-possession must first demonstrate that the continuation of the collective bargaining agreement would be burdensome to the estate. Once the court has made that threshold determination, "the debtor-in-possession must make a factual presentation sufficient to permit the Bankruptcy Court to weigh the competing equities." *Id.* at 81. The Bankruptcy Court must consider the rights of the covered employees as well as the sacrifices which other creditors are making in order to allow the debtor to be successfully organized, and the court must make a reasoned determination that rejection of the labor contract will assist the debtor-in-possession or the trustee to achieve a satisfactory reorganization. *Id.*

84. *Id.* at 78-79, 82-83.

85. 465 U.S. 513 (1984).

86. *Id.* at 516.

87. *Id.* at 522 n.6. See *supra* note 53.

88. 11 U.S.C. § 365(b) and (c) (1982).

89. 465 U.S. 513, 522-23.

precedence over section 8(d), prohibiting termination of a collective bargaining agreement during its term.⁹⁰

The Court then proceeded to determine which of the various standards should govern rejection of a collective bargaining agreement. The Court held that because of the special nature of a collective bargaining agreement "and the consequent 'law of the shop' which it creates," a standard more searching than the "business judgment" test should control.⁹¹ The Court resolved the debate over the rejection standard by agreeing with the Third Circuit that *Kevin Steel*, not *REA Express*, provided the appropriate accommodation between the national labor law policy, protecting collective bargaining agreements, and the policy of the Bankruptcy Code, encouraging successful reorganizations of failing businesses.⁹² The Supreme Court held that "the Bankruptcy Court should permit rejection of a collective bargaining agreement . . . if the debtor can show that the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract."⁹³ In balancing the equities, the Court placed the greatest weight on whether rejection will promote successful rehabilitation of the debtor. The Court stated:

Since the policy of Chapter 11 is to permit successful rehabilitation of debtors, rejection should not be permitted without a finding that that policy would be served by such action. . . . Determining what would constitute a successful rehabilitation involves balancing the interests of the affected parties—the debtor, creditors, and employees. The Bankruptcy Court must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the employees. In striking the balance, the Bankruptcy Court must consider not only the degree of hardship faced by each party, but also any qualitative difference between the types of hardship each may face.

. . . The Bankruptcy Code does not authorize freewheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization.⁹⁴

In interpreting the Court's rejection standard, the balance seems to be tipped in favor of rejection as long as the possibility exists that the business may be rehabilitated. The Court emphasized that the goal of Chapter 11 is rehabilitation, not liquidation: "The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic

90. The Court was unanimous in this regard. *Id.* at 522–23 (Rehnquist, J., for the majority); *id.* at 535 (Brennan, J., concurring in part).

91. *Id.* at 524 (citing *John Wiley & Sons v. Livingston*, 376 U.S. 543, 550 (1964) and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578–79 (1960)).

92. 465 U.S. 513, 523–24. The Court also endorsed the Eleventh Circuit's opinion in *In re Brada Miller Freight Sys.*, 702 F.2d 890 (1983), and its application of the "balancing of the equities" standard. *Id.* at 525–26.

93. 465 U.S. 513, 526.

94. *Id.* at 527. We will examine these factors that go into the balancing of the equities in some detail below, because this *Bildisco* standard serves as the basis for the standard adopted by Congress in § 1113. See *infra* notes 293–326 and accompanying text.

resources.”⁹⁵ If, however, it appears that it will not be possible to rehabilitate the business, then, under the Court’s approach, rejection of a collective bargaining agreement should be denied. When Chapter 11 reorganization proceedings are used for liquidation, not rehabilitation, the debtor should not be entitled to reject its collective bargaining agreement under *Bildisco*.

By stressing the goal of rehabilitation, and predicated a ruling in favor of rejection on such a finding, the Court modified the prevailing view of the law. In several cases prior to *Bildisco*, rejection had been granted when the debtor-in-possession was in the process of liquidation.⁹⁶ After *Bildisco*, rejection should be denied in similar settings because the policy of successful rehabilitation will not be served by such rejection.

In allowing rejection of labor contracts under section 365, the Court recognized national labor policy, not only by adopting a rejection standard more stringent than that applied to commercial contracts, but by including a bargaining component in the process of rejection. The Court required an employer to make reasonable efforts to negotiate a voluntary modification of the collective bargaining agreement as a prerequisite to a ruling on rejection:

Before acting on a petition to modify or reject a collective bargaining agreement, however, the Bankruptcy Court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution. The NLRA requires no less. . . . If the parties are unable to agree, a decision on the rejection of the collective bargaining agreement may become necessary to the reorganization process. At such a point, action by the Bankruptcy Court is required, while the policies of the Labor Act have been adequately served since reasonable efforts to reach agreement have been made. That court need not determine that the parties have bargained to impasse or make any other determination outside the field of its expertise.⁹⁷

The Court did not define “reasonable efforts” except to indicate that such efforts do *not* include a duty to bargain to impasse.⁹⁸ Nevertheless, many of the same factors considered by the NLRB and the courts in determining whether parties have bargained in good faith will be relevant in determining whether the parties have made reasonable efforts to reach agreement on modifications. A decision on what efforts are reasonable will depend on the specific facts of each case, just as a good faith bargaining determination under the NLRA depends on the totality of the circumstances surrounding the parties’ negotiations for a new contract.⁹⁹

95. 465 U.S. 513, 528. The dissenters agreed with the majority on this point: “[t]he primary goal of Chapter 11 is to enable a debtor to restructure his business so as to be able to continue operating.” *Id.* at 550 (Brennan, J., dissenting).

96. See, e.g., *In re Alan Wood Steel Co.*, 449 F. Supp. 165 (E.D. Pa. 1978); *In re Concrete Pipe Mach. Co.*, 28 Bankr. 837 (Bankr. N.D. Iowa 1983); *In re Allied Technology*, 8 Bankr. 366 (Bankr. S.D. Ohio 1980).

97. 465 U.S. 513, 526–27.

98. At least one commentator has argued that the bargaining duty prior to rejection under *Bildisco* is the same as the duty to bargain under the NLRA. See Kilroy, *In re Bildisco: New Hurdles for the Rejection of a Collective Bargaining Agreement in Bankruptcy*, 35 LABOR L.J. 368, 372 (1984). Without the requirement of impasse, however, this is not the case.

99. Presumably, defining “reasonable efforts” will depend on the circumstances: how much advance notice the employer was able to give the union of its decision to file bankruptcy; whether the employer discussed the possibility of filing bankruptcy with the union before doing so; how long a period of time has passed since the employer filed bankruptcy; how many negotiation sessions have been held; how much time has actually been spent in negotiations;

Furthermore, this duty to make reasonable efforts to negotiate modifications is a duty which, in this context, must be fulfilled only by the employer. Obviously, the union will not be able to prevent a bankruptcy court from ruling on the employer's rejection application by refusing to make any reasonable efforts to negotiate a modified agreement. The court's sanction for a union's refusal to make reasonable efforts will be to grant the employer's rejection application. On the other hand, if the employer does not make reasonable efforts, the sanction against it presumably will be to refuse to rule on or to deny its rejection application. Whether this somewhat limited bargaining duty on the part of the employer will result in any meaningful settlement agreements remains to be seen in those remaining cases to which the *Bildisco* opinion applies—any bankruptcy cases filed before July 10, 1984, the effective date of the new amendments to the Code.¹⁰⁰

V. THE EMPLOYER'S RIGHT TO MAKE UNILATERAL CHANGES DURING BANKRUPTCY

The Court's decision on the first issue in *Bildisco*, the power to reject collective bargaining agreements and the applicable standard to use, provoked relatively little reaction from the labor community. In contrast, its decision on the second area of conflict between labor law and bankruptcy, the right of an employer to make unilateral changes during bankruptcy, created a storm of protest. Once rejection of a collective bargaining agreement becomes a possibility, the second question must be addressed: whether or not an employer may unilaterally alter working conditions without first fulfilling its bargaining obligations under sections 8(a)(5) and 8(d) of the NLRA.

whether both sides made proposals and counterproposals; and whether there has been significant give and take. Many of these factors are the same factors the NLRB and the federal appellate courts use in deciding whether the parties are bargaining in good faith under the "totality of the circumstances" approach of the NLRA. See *infra* notes 294-96 and accompanying text.

100. 126 BANKR. L. REP. (CCH) 2 (July 12, 1984). The new section on rejection of collective bargaining agreements, 11 U.S.C.A. § 1113 (West Supp. 1985), took effect on the date of enactment, July 10, 1984. Pub. L. No. 98-353, § 541(c), 98 Stat. 333, 391.

It will be impossible to judge the real effectiveness of the Court's "reasonable efforts" requirement because, if a settlement is reached, any rejection motion on file will become moot and no decision of the court will be issued or reported. In examining those cases which have been decided under *Bildisco*, substantial efforts were made by debtors to negotiate contract modifications in some cases. See, e.g., *In re Air Florida Sys.*, 48 Bankr. 440 (Bankr. S.D. Fla. 1985) (although the debtor unilaterally suspended its collective bargaining agreement upon filing bankruptcy per *Bildisco*, it negotiated a short term interim agreement with the union; after the debtor petitioned for rejection, the court continued the hearing on three occasions and directed the parties back to bargaining, which included multiple sessions conducted with the assistance of the National Mediation Board); *In re Briggs Transp. Co.*, 39 Bankr. 343 (Bankr. D. Minn. 1984) (debtor met with international union president in Washington, D.C., and local officials in Chicago before filing for rejection and, at court's insistence, made another attempt to negotiate following rejection hearing). Apparently, no efforts to negotiate contract modifications were made in other cases. See, e.g., *In re Robinson Truck Line*, 47 Bankr. 631 (Bankr. N.D. Miss. 1985) (the debtor merely informed the union of its unilateral termination of its employee health and welfare plan, which the court allowed it to reject); *In re C & W Mining Co.*, 38 Bankr. 496 (Bankr. N.D. Ohio 1984) (although the union made several attempts to negotiate concessions after the debtor closed down its mining operations, the debtor never responded; court denied rejection for several reasons, including the bad faith of the debtor).

A. The Right of an Employer to Modify or Terminate the Contract Pre-Bildisco

Outside of the labor relations context, the ability of the debtor-in-possession to make changes in its operations in response to rejection of a contract is assumed. Once the contract is terminated, the debtor is free to conduct its business without regard to the previous contracting party.

Under labor law, however, different rules apply. Assuming a bankruptcy court approves rejection of a collective bargaining agreement, rejection results in termination of the contract. There is then *no* collective bargaining agreement in effect between the parties. The parallel situation in normal, nonbankruptcy labor relations occurs when a collective bargaining agreement expires at the end of its term. As discussed above, when a collective bargaining agreement expires, the employer is obligated to bargain with the union for a new contract. This bargaining duty includes the requirement that the employer continue to abide by the existing terms and conditions of employment until it either enters into a new contract or bargains to impasse. If impasse is reached without agreement on a new contract, the employer may then unilaterally implement changes in the status quo consistent with its last bargaining offer to the union.¹⁰¹

Thus, even if section 8(d)'s prohibition on unilateral midterm termination or modification is superseded by section 365 of the Code, once the collective bargaining agreement is terminated via rejection, the employer has a duty under section 8(a)(5) to bargain for a new contract. As a corollary of this duty, the employer may not make any actual changes in wages or employment conditions in order to reduce costs until it fulfills this bargaining obligation.

Enforcement of the section 8(a)(5) duty to bargain against a bankruptcy trustee or debtor-in-possession has been fairly straightforward in the *absence* of a dispute over *rejection* of a collective bargaining agreement.¹⁰² In the first appellate court decision on this issue under the new Bankruptcy Code, *Yorke v. NLRB*,¹⁰³ the Seventh Circuit Court of Appeals upheld an NLRB unfair labor practice order against a Chapter 11 trustee for failing to bargain with the union about the effects of closing the business during the term of a collective bargaining agreement.¹⁰⁴ The court stated:

We start with the proposition that a Trustee in Bankruptcy, like any other employer, must abide by the labor laws, as long as they prescribe conduct consistent with the duties imposed by the Bankruptcy Code

101. See *supra* notes 24, 29 and accompanying text.

102. See *supra* notes 62-63 and accompanying text, discussing the debtor-in-possession's status as an "employer" within the meaning of the NLRA.

103. 709 F.2d 1138 (7th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984).

104. *Id.* at 1144. The effects of closing a business are mandatory subjects of bargaining under § 8(a)(5), whereas the actual decision to close is not. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), resolved a conflict between the circuits on the duty to bargain over plant closure. The Court held that bargaining was not required over an economically-motivated *decision* to partially close a plant or business, but bargaining over the *effects* of the closure was required. Similarly, in a line of cases dealing with total plant closure, the NLRB has held that bargaining over the effects of the closure is mandatory. See *Merryweather Optical Co.*, 240 N.L.R.B. 1213, 1215 (1979); *Stagg Zipper Corp.*, 222 N.L.R.B. 1249, 1249 (1976); *Automation Inst. of Los Angeles*, 208 N.L.R.B. 725, 726 (1974); *Triplex Oil Ref. Div. of Pentalic Corp.*, 194 N.L.R.B. 500, 504 (1971); *Interstate Tool Co.*, 177 N.L.R.B. 686, 687 (1969); *Transmarine Navigation Corp.*, 170 N.L.R.B. 389, 389 (1968), *on remand from* 380 F.2d 933 (9th Cir. 1967).

The law in question—the duty to bargain over the effects of a decision to terminate operations—strikes us as critical to protect employees from the ravages of economic dislocation

We believe that recognizing a duty to bargain would not unduly impede the Trustee's discharge of his responsibilities.¹⁰⁵

The court enforced the NLRB's order under section 8(a)(5), requiring the trustee to bargain with the union in good faith and to pay the employees a certain amount of back pay as an administrative expense.¹⁰⁶

In contrast to *Yorke*, the federal courts have given only limited effect to the employer's duty to bargain when rejection of a collective bargaining agreement has been the issue. The courts have universally repeated that *after* rejection has been granted, the employer is bound by the NLRA to bargain in good faith for a new contract.¹⁰⁷ However, the courts have removed from this bargaining obligation the section 8(a)(5) limitation on the employer's right to make unilateral changes prior to reaching impasse.

The first federal court to recognize and deal with the limitation on an employer's right to make unilateral changes in the rejection context was the Second Circuit Court of Appeals in *REA Express*.¹⁰⁸ The *REA Express* case involved employees of a public

105. *Yorke v. NLRB*, 709 F.2d 1138, 1142-43 (7th Cir. 1983). Although the court found that the trustee's failure to notify the union before shutting down the plant was excused by the emergency nature of the decision, the trustee's subsequent refusal to bargain over the effects of the shutdown was not excusable: "Once operations had been terminated, the emergency situation ended." *Id.* at 1144. The court agreed with the NLRB that the trustee violated § 8(a)(5) by refusing to bargain over the effects of closing the business, such as the layoff and recall of employees, transfer rights, and severance pay.

106. *Id.* at 1144-46. The NLRB had required the trustee to pay the laid off employees their normal wages computed from the date of the trustee's initial refusal to bargain. The court modified the back pay order to run from the date of the court order until a settlement agreement was reached, or until the parties bargained to impasse, with the qualification that the employees receive at least two weeks of back pay. *Id.* at 1146. This back pay award for a minimum of two weeks pay is known as the *Transmarine* remedy, adopted by the Board in *Transmarine Navigation Corp.*, 170 N.L.R.B. 389 (1968), as a remedy for an employer's refusal to bargain over the effects of closing a plant. The two week minimum backpay award is used to discourage the employer from attempting to reach a premature impasse in bargaining.

Furthermore, the court agreed with the bankruptcy court below that the NLRB monetary award for failure to bargain in good faith was entitled to priority as an administrative expense, because the decision to close the business and the subsequent failure to bargain were attributable to the trustee's efforts to "preserve the estate" on the creditors' behalf within the meaning of the administrative expense priority. *Yorke v. NLRB*, 709 F.2d 1138, 1143 (7th Cir. 1983). See 11 U.S.C. § 503(b)(1) (1982) for the general definition of an administrative expense, and *supra* note 57.

107. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 534 (1984) ("debtor-in-possession remains obligated to bargain in good faith under NLRA § 8(a)(5) over the terms and conditions of a possible new contract"); *In re Brada Miller Freight Sys.*, 702 F.2d 890, 899 (11th Cir. 1983) ("debtor-in-possession, even after rejection, is compelled to bargain with an established bargaining unit in an attempt to execute a new collective bargaining agreement"); *In re Bildisco*, 682 F.2d 72, 80 (3d Cir. 1982) ("the debtor-in-possession who rejects a collective bargaining agreement remains an employer and is still required by the NLRA to bargain with the representatives of its employees").

In *Shopmen's Local Union No. 455 v. Kevin Steel Prod.*, 519 F.2d 698 (2d Cir. 1975), when the Second Circuit created its "new entity" theory, it stated that even as a new entity, the debtor must comply with the obligations of the NLRA: "[i]t must be remembered that . . . the Bankruptcy Act . . . does not authorize a debtor-in-possession to ignore its obligations under the Labor Act any more than it can ignore those imposed by the Internal Revenue Code." *Id.* at 706.

108. *Brotherhood of Ry., Airline & S.S. Clerks v. REA Express*, 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975). The court phrased the issue as "whether, in addition to being required to bargain with the unions . . . the debtor-in-possession, as a new employer, is also obligated to maintain the status quo, i.e., adhere to the terms and conditions of employment presently in effect pending negotiations with the union for collective bargaining agreements." *Id.* at 170.

Whether an employer could make unilateral changes without first bargaining to impasse was not an issue in *Kevin Steel* because the collective bargaining agreement being rejected had never been entered into by the employer, so there was no contract status quo to protect. See note 68 *supra* for facts of *Kevin Steel*.

carrier subject to the provisions of the Railway Labor Act (RLA), not the NLRA. The RLA's limitation on unilateral changes after a contract has expired is similar to that of the NLRA, except that in the RLA the limitation is specifically set forth in the statutory language, not implied by judicial construction as it is under the NLRA.¹⁰⁹ In addition, the prohibition extends until protracted bargaining, mediation, and cooling-off procedures are completed, not just until impasse is reached.¹¹⁰ In spite of this explicit language, the court in *REA Express* allowed the employer to change existing working conditions without following the RLA provisions and without bargaining to impasse.¹¹¹

As justification, the court in *REA Express* adopted the "new entity" theory developed by the *Kevin Steel* court.¹¹² The court held that as a new successor employer, the debtor-in-possession was obligated to bargain for a new contract with the representative of the employees it has taken on, but it was not obligated to maintain the status quo then in effect, relying on the Supreme Court's opinion in *NLRB v. Burns Security Services*.¹¹³ The court was of the opinion that the freedom given to a successor employer under labor law to restructure the business was particularly important in bankruptcy: "Unless the debtor-in-possession is permitted to act promptly, albeit unilaterally, in avoiding onerous employment terms that will prevent it from continuing as a going concern, the enterprise, and with it the employment of its workers, may fail."¹¹⁴ The court believed that maintaining the status quo pending the protracted negotiations required by the RLA, including arbitration and mediation, would make it impossible for the debtor's business to survive.

The court did not give the debtor an entirely free hand, however. It required the debtor "to give reasonable notice of its proposed terms and to negotiate in good faith for a reasonable length of time" before implementing its changes.¹¹⁵ Faced with the

109. Section 6 of the RLA provides that "rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section [5]" 45 U.S.C. § 156 (1982). Section 5 provides that if mediation has failed: "for thirty days thereafter, . . . no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the disputes arose." 45 U.S.C. § 155 (1982).

110. Section 6 of the RLA sets forth a complicated procedure for negotiating a new contract. The party desiring changes must first give the other party 30 days written notice of intended changes. Then, within 10 days, the parties must set the time and place of the first bargaining session. This session must take place within the 30 day notice period.

If the parties cannot agree, the changes can be made 10 days after the last conference, unless either party requests the Mediation Board to mediate. If mediation fails, the Board will try to convince the parties to accept arbitration. If either party refuses to accept arbitration, the requested changes still cannot be made for another 30 days. 45 U.S.C. §§ 155, 156 (1982).

111. *Brotherhood of Ry., Airline and S.S. Clerks v. REA Express*, 523 F.2d 164, 170 (2d Cir. 1975).

112. *Shopmen's Local Union No. 455 v. Kevin Steel Prod.*, 519 F.2d 698, 704 (2d Cir. 1975); see *supra* note 69.

113. 406 U.S. 272 (1972); *Brotherhood of Ry., Airline and S.S. Clerks v. REA Express*, 523 F.2d 164, 170-71 (2d Cir. 1975). For a discussion of *Burns*, see *supra* notes 42-44 and accompanying text.

The court went on to discuss dicta in *Burns* in which the Supreme Court suggested that in some situations, in which it is clear that a successor employer will retain all the employees in a bargaining unit, the successor should consult with the union before changing the status quo. *NLRB v. Burns Security Servs.*, 406 U.S. 272, 294-95 (1972). The Second Circuit decided that this should apply only when employees are led to believe that their employment will continue with the successor under the old contract's terms and conditions. The *REA Express* court argued that the fact the employer had filed a petition for reorganization under Chapter XI put the employees on notice that changes in the terms of employment would be required to avert the company's collapse. 523 F.2d 164, 171 (2d Cir. 1985).

114. 523 F.2d 164, 170-71 (2d Cir. 1985).

115. *Id.* at 171. Except for the requirement of actually bargaining to impasse, this bargaining obligation imposed by

RLA's time-consuming requirements, the court viewed this modified negotiation requirement as the most appropriate way to reconcile the employer's bargaining obligations under the RLA with the bankruptcy objective of preserving the estate for a successful reorganization.

After *REA Express*, the next court to address the issue was the Court of Appeals for the Third Circuit in *In re Bildisco*.¹¹⁶ The Third Circuit did not explicitly deal with the right of an employer to make unilateral changes under section 8(a)(5), but dealt with the conflict in terms of the employer's right to modify the contract under section 8(d).¹¹⁷ In also adopting the "new entity" theory of *Kevin Steel* and treating the debtor-in-possession as a successor employer, the court held that the employer is no longer bound by the collective bargaining agreement as soon as it files bankruptcy.¹¹⁸

By terminating the contract immediately upon the debtor's bankruptcy filing, and without imposing any duty to bargain before the employer may make unilateral changes, the Third Circuit greatly expanded the employer's freedom of action under the NLRA in comparison with the *REA Express* court's more limited compromise under the RLA. The court did recognize that a portion of the unfair labor practices had been committed by Bildisco before the bankruptcy was filed.¹¹⁹ On remand of the Board order, the court asked the NLRB to separate the prepetition violations from the postpetition ones. The prepetition unfair labor practices could eventually serve as the basis for a claim against the estate, whereas the postpetition ones no longer existed.¹²⁰

The Third Circuit did acknowledge, however, that once rejection of the collective bargaining agreement was approved, the employer was under a duty to bargain with the union for a new contract. In discussing rejection under the "balancing of the equities" standard, the court commented:

The bankruptcy court [in balancing the equities] must understand that the debtor-in-possession who rejects a collective bargaining agreement remains an employer and is still required by the NLRA to bargain with the representatives of its employees . . . and that its employees retain their right to strike should negotiations fail.¹²¹

The court seemed to imply that this duty to bargain did not arise until after rejection of the old contract was granted.

the *REA Express* court would meet the requirements of § 8(a)(5) of the NLRA even though it did not begin to meet the much more complicated procedures of the RLA.

116. 682 F.2d 72 (3d Cir. 1982).

117. *Id.* at 78. The NLRB had defined the unfair labor practice at issue in *Bildisco* as solely a violation of § 8(d) in altering or terminating the collective bargaining agreement itself. No separate § 8(a)(5) violation based on the employer's unilateral change in the status quo would have been raised in the NLRB proceedings because the contract was still in effect.

118. *Id.* at 83 ("The debtor-in-possession's position is analogous to that of a successor employer; it may be required to recognize and bargain with the union, but it is not a party to its predecessor's collective bargaining agreement unless it assumes that agreement.").

119. For a summary of the facts in *Bildisco*, see *supra* notes 80-81 and accompanying text.

120. 682 F.2d 72, 84 (3d Cir. 1982). The court found that if rejection of the collective bargaining agreement was approved on remand of the rejection issue to the bankruptcy court, "the Board would be bound by that determination, which would preclude any post-petition unfair labor practice arising from the rejected agreement." *Id.*

121. *Id.* at 80.

B. *Unilateral Termination of the Contract in Bildisco*

The *Bildisco* case at last reached the Supreme Court, which, in a five-to-four split, made explicit what the Third Circuit had implied. The majority, per Justice Rehnquist, phrased the second issue in *Bildisco* as follows:

(2) May the National Labor Relations Board find a debtor-in-possession guilty of an unfair labor practice for unilaterally terminating or modifying a collective-bargaining agreement before rejection of that agreement has been approved by the Bankruptcy Court.¹²²

Although the issue was phrased solely in terms of “terminating or modifying” the contract, the Court’s discussion recognized that “modifying” or “terminating” the contract included the question whether the employer could actually change working conditions before rejection and without bargaining with the union.¹²³

In ruling on this second issue, the majority held that the power to reject a collective bargaining agreement under section 365 included the right of the employer to modify the contract and change terms and conditions of employment immediately upon filing bankruptcy.¹²⁴ Although the Court rejected the lower courts’ “new entity” theory, recognizing it as a fiction in the bankruptcy context,¹²⁵ the majority agreed with the Third Circuit that the collective bargaining agreement becomes unenforceable on the date the employer files bankruptcy. The Court based its elimination of any postpetition unfair labor practice on a different rationale. Justice Rehnquist stated that although the debtor-in-possession was the same entity which existed before the bankruptcy filing, the debtor was “empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing.”¹²⁶ After tracing the path of a claim resulting from rejection of a contract through the bankruptcy process, the Court simply concluded that the NLRB is precluded from enforcing the provisions of section 8(d) during the interim period between a debtor’s bankruptcy filing and a court’s ruling on rejection.¹²⁷

If section 8(d) were enforced, “the practical effect . . . would be to require adherence to the terms of the collective bargaining agreement.”¹²⁸ However, the Court continued, “the filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again.”¹²⁹ Requiring adherence to the contract “would run directly counter to the express provisions of the Bankruptcy Code and to the Code’s overall

122. 465 U.S. 513, 516 (1984).

123. Justice Rehnquist explained: “Our rejection of the need for full compliance with § 8(d) procedures of necessity means that any corresponding duty to bargain to impasse under § 8(a)(5) and § 8(d) before seeking rejection must also be subordinated to the exigencies of bankruptcy.” *Id.* at 533.

124. *Id.* at 528–29.

125. *Id.* at 528 (“Obviously, if the [debtor-in-possession] were a wholly ‘new entity,’ it would be unnecessary for the Bankruptcy Court to allow it to reject executory contracts, since it would not be bound by such contracts in the first place.”).

126. *Id.*

127. *Id.* at 531–33.

128. *Id.* at 532.

129. *Id.*

effort to give a debtor-in-possession some flexibility and breathing space.”¹³⁰ If the collective bargaining agreement could not be modified, and, presumably, unilateral changes in working conditions could not be made, whatever benefit the debtor receives from its right to reject the contract would be undermined.¹³¹

The Court held that from the filing of a petition in bankruptcy “until formal acceptance, the collective bargaining agreement is not an enforceable contract within the meaning of NLRA section 8(d).”¹³² The Court stated that the modification of the contract is accomplished, not by the employer’s unilateral changes in the contract, but by operation of law upon filing bankruptcy.¹³³ Section 8(d) is not applicable to this modification by law, and the NLRB is precluded from enforcing section 8(d) to prevent an employer’s unilateral rejection of a collective bargaining agreement. Although the Supreme Court rejected the “new entity” theory as a fiction, it appears to have created a fiction of its own: it is the Bankruptcy Code, not the employer’s actions, which modifies the contract. Therefore, section 8(d) has not been violated.

The Court majority disposed of any argument in regard to the section 8(a)(5) prohibition of unilateral changes by subsuming it under the termination procedures of section 8(d) and tying it to the employer’s bankruptcy right to seek rejection. After holding that the collective bargaining agreement is not enforceable under section 8(d) from the bankruptcy filing until formal acceptance, if any, the Court phrased the union’s alternative argument as follows: Whether the debtor-in-possession “should be required to ‘bargain to impasse’ *prior to seeking rejection* from the Bankruptcy Court.”¹³⁴ The Court did not phrase the issue as whether or not the debtor-in-possession should be required to bargain to impasse prior to making any unilateral changes in terms and conditions of employment, but tied the bargaining obligation to the filing of the rejection petition. In this way, the Court made it easy to eliminate any duty to bargain by initially suggesting that the NLRA bargaining obligation might be a precondition or limitation on the employer’s exercise of its bankruptcy rights, and then repudiating any such suggestion. The Court answered its formulation with a single sentence: “Our rejection of the need for full compliance with § 8(d) procedures of necessity means that any corresponding duty to bargain to impasse under § 8(a)(5) and § 8(d) before seeking rejection must also be subordinated to the exigencies of bankruptcy.”¹³⁵ In a footnote, the Court cited *NLRB v. Katz*,¹³⁶ the seminal case holding that an employer must bargain to impasse before making unilateral changes in the status quo. The Court, however, quickly distinguished *Katz* because it “did not address the effect of the bankruptcy laws on an employer’s duty to bargain under section 8(a)(5).”¹³⁷ The Court stated that if section 8(a)(5) prohibited unilateral changes between the date bankruptcy was filed and the date the court authorized

130. *Id.*

131. *Id.* at 529.

132. *Id.* at 532.

133. *Id.* at 533.

134. *Id.* (emphasis added).

135. *Id.*

136. 369 U.S. 736 (1962).

137. 465 U.S. 513, 533 n.14 (1984).

rejection, such a result “would largely, if not completely, undermine whatever benefit the debtor-in-possession otherwise obtains by its authority to request rejection of the agreement.”¹³⁸ Consequently, under the Court’s holding, the NLRB cannot enforce either section 8(d) or section 8(a)(5) after the debtor has filed bankruptcy and while the rejection application is pending in the bankruptcy court.

The majority asserted that the result in *Bildisco* “does not undermine the policy of the NLRA.”¹³⁹ In part, the Court justified its holding by pointing out that the *Bildisco* opinion does not relieve the bankrupt employer of all its obligations under the NLRA: “A debtor-in-possession is an ‘employer’ within the terms of the NLRA . . . and is obligated to bargain collectively with the employees’ certified representative over the terms of a *new contract* pending rejection of the existing contract or following formal approval of rejection by the Bankruptcy Court.”¹⁴⁰ Under this language, the employer may presumably make any unilateral changes it wishes on filing bankruptcy, but, at some point in the rejection process, the duty to bargain magically reappears. According to the Court, *pending rejection*, or following approval of rejection, the employer must begin to bargain for a new contract.

In an opinion joined by three other Justices, Justice Brennan dissented on the second issue in *Bildisco*, opposing the employer’s right to modify or terminate the contract on filing bankruptcy.¹⁴¹ The debtor-in-possession, he believed, does commit an unfair labor practice by unilaterally modifying the collective bargaining agreement and changing terms and conditions of employment before rejection has been approved by the bankruptcy court. Although Justice Brennan did not directly address the issue, he also suggested that even if rejection is granted, the employer must still bargain to impasse per *Katz* before making any unilateral changes in working conditions.¹⁴² The

138. *Id.* at 528–29.

139. *Id.* at 534. In the final paragraph of the majority’s slip opinion, this sentence and the following sentence read: Our determination that a debtor-in-possession does not commit an unfair labor practice by failing to comply with § 8(d) prior to formal rejection of the collective-bargaining agreement *does undermine the policy of the NLRA*, for that policy, as we have noted, is to protect the process of labor negotiations, not to impose particular results on the parties. . . . Nevertheless, it is important to note that the debtor-in-possession is not relieved of all obligations under the NLRA simply by filing a petition for bankruptcy.

Slip. op. at 19, 104 S. Ct. 1188, 1200–01 (1984)(emphasis added)(citations omitted).

The author was informed by the Office of the Reporter of Decisions, U.S. Supreme Court, per a telephone call, that the word “not” was inserted in the first sentence at the request of the Justice after the slip opinion was published. The sentence now reads: “Our determination . . . does *not* undermine the policy of the NLRA” 465 U.S. 513, 534 (1984)(emphasis added).

The addition of the negative reverses the import of the first sentence, but makes the remainder of the sentence meaningless and is inconsistent with the word “nevertheless” at the beginning of the next sentence. This change in the opinion appears to be a substantive one, not the mere correction of a typographical error. The entire paragraph makes sense only with the original wording, causing one to speculate why the “not” was later added.

140. *Id.* (emphasis added).

141. Justice Brennan was joined by Justices White, Marshall, and Blackmun. *Id.* at 535.

142. In a footnote, Justice Brennan stated that even if the collective bargaining agreement was not in effect, or became unenforceable on the debtor’s bankruptcy filing per the majority’s opinion, “it does not necessarily follow that the debtor in possession may unilaterally alter terms and conditions of employment.” *Id.* at 546 n.14 (citing *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (an employer’s unilateral change in the terms and conditions of employment during the negotiation of an initial contract violates § 8(a)(5)). The dissent pointed out that “it has been widely held that an employer generally may not make unilateral changes in matters that are mandatory subjects of bargaining even after a collective-bargaining agreement has expired.” *Id.* (citing *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 735 (9th Cir. 1981); *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 729 (9th Cir. 1980); *Hinson v. NLRB*, 428 F.2d 133, 136 (8th Cir. 1970)).

dissent agreed with the majority that section 8(d) does not control or limit a bankruptcy court's ability to approve rejection of that contract, but strenuously objected to the majority's conclusion that the bankruptcy provisions render the NLRA requirements a nullity as soon as a bankruptcy petition is filed.

Justice Brennan outlined a middle ground which would accommodate both bankruptcy and NLRA policies during the interim period: Section 8(d)'s proviso should remain in effect and should be enforceable against the debtor-in-possession until rejection has been approved by the bankruptcy court.¹⁴³ Only when rejection is approved should the collective bargaining agreement be considered terminated. The section 8(d) proviso does not prohibit termination by way of rejection, but it does limit the employer's freedom to terminate the collective bargaining agreement prior to court approval. In the dissent's view, a debtor-in-possession commits an unfair labor practice if it unilaterally alters the terms of a contract immediately on filing bankruptcy. The dissent agreed that the ability to reject a collective bargaining agreement is essential, "[b]ut the option to violate a collective bargaining agreement before it is rejected is scarcely vital to insuring successful reorganization."¹⁴⁴ In fact, because such immediate and unilateral alterations of labor contracts by debtors-in-possession have led to labor strikes, violations of section 8(d) may even decrease, in the dissent's opinion, the possibility of a successful rehabilitation.¹⁴⁵

C. An Evaluation of *Bildisco*

From one perspective, the Court's treatment of the collective bargaining agreement in *Bildisco* can be viewed as a continuation of the more restrictive scope given to labor contracts in the successor employer cases under section 301 and the NLRA.¹⁴⁶ Although the Court rejected the appellate courts' "new entity" theory as derived from the Court's successorship doctrine, it used the policy behind the successorship cases to support its result. In *Burns*, the Court justified its holding that a successor employer was not bound by its predecessor's collective bargaining agreement in the following words:

143. 465 U.S. 513, 550-53 (1984).

144. *Id.* at 550.

145. *Id.* Justice Brennan argued:

Plainly, the need to prevent "economic warfare" resulting from unilateral changes in terms and conditions of employment is as great after a bankruptcy petition has been filed as it is prior to that time. I do not think that there is any question that the threat to labor peace stemming from a unilateral modification of a collective bargaining agreement is as great one day after a bankruptcy petition is filed as it was one day before the petition was filed.

Id. at 548-49. The dissent then noted that Continental Airlines' abrogation of its collective bargaining agreements upon filing bankruptcy in September 1983, resulted in an immediate strike by the pilots and flight attendants. *Id.* at 549 n.16.

The flight attendants at Continental Airlines ended their strike in April 1985, but as of September 1985, after two years, the pilots still remained on strike. Although the parties have been bargaining under order of the bankruptcy judge handling the case, no agreement has been reached and Continental is now attempting to withdraw recognition from the pilots' union. See 118 LAB. REL. REP. (BNA) 324 (April 29, 1985), and 120 LAB. REL. REP. (BNA) 11 (September 2, 1985).

146. See *supra* notes 42-44 and accompanying text. For an alternative view that *Bildisco* can be viewed as an extension of the Court's decision in *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), giving the employer the unencumbered prerogative to close a portion of its business without bargaining with the union, see Gregory, *Labor Contract Rejection in Bankruptcy: The Supreme Court's Attack on Labor* in *NLRB v. Bildisco*, 25 B.C.L. Rev. 539, 597-603 (1984).

A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.¹⁴⁷

The Court in *Bildisco* cited this language and stated that a "similarly beneficial recapitalization could be jeopardized if the debtor-in-possession were saddled automatically" with its prior collective bargaining agreement.¹⁴⁸ By use of the word "prior," the Court is treating a debtor-in-possession's collective bargaining agreement as if it were the contract of a previous employer. The successorship cases provide a convenient framework for the court because a successor employer's freedom to change terms and conditions of employment *before* becoming subject to any bargaining obligation offers the only labor law parallel to the result reached in *Bildisco*. In this light, *Bildisco* can be viewed as an extension, in a different context, of the Court's successorship doctrine.

From another perspective, however, the Supreme Court's treatment of the collective bargaining agreement in *Bildisco* marks a fundamental shift in the Court's historical deference to labor agreements.¹⁴⁹ Instead of giving an expansive interpretation to the contract and its role in the parties' relationship, the Court has shortened its life with this premature termination in bankruptcy. The Court has zealously protected collective bargaining agreements in the past in order to promote the resolution of labor disputes through the contract's arbitration procedures. In this way, the Court has sought to maintain industrial peace by preventing unions from going on strike as long as a collective bargaining agreement remains in effect.¹⁵⁰ As a result of the holding in *Bildisco*, however, a union is free to strike as soon as the contract is no longer in effect—in other words, as soon as the employer files bankruptcy. The contract's arbitration provisions become unenforceable and the union is no longer bound by its no-strike promise.

Evidently, in this day of relatively few strikes, the Court majority does not seem so concerned about the possibility of economically disruptive strikes. Perhaps the

147. 406 U.S. 272, 287-88 (1972).

148. 465 U.S. 513, 528 (1984).

149. Professor White also views *Bildisco* as a symbolic decision on a broader scale, indicating a fundamental skepticism by the Court toward modern unions. White, *supra* note 65, at 1201, 1202-03 n.103. All members of the Court rejected the union's position on § 8(d) and agreed that a collective bargaining agreement could be rejected in bankruptcy despite the NLRA. Professor White comments:

That an occasional union might have its collective bargaining agreement rejected in bankruptcy is a small matter. That the 9-0 vote in *Bildisco* shows the Court to have adopted the negative polar view of unions is a matter of great importance.

. . . [It] has a meaning for every case involving union rights that comes before the Supreme Court in the foreseeable future. It means that their arguments will be met with a skepticism formerly reserved for the rich and selfish, not with the traditional sympathy accorded the working man. It means that the assertion that the union speaks for and correctly represents the individual's interest will now be open to question. Worse, it may mean that lower courts, taking their lead from the Supreme Court, will be more hostile to the union's interests in a whole host of ways.

It is ironic therefore, that *Bildisco*, touted as a critical bankruptcy case, may have only a modest impact on the bankruptcy law, and yet, may have a far-reaching impact on labor law.

Id. at 1203 n.103.

150. See *supra* note 47.

Court expects relatively few unions or employees to be so foolhardy as to jeopardize their jobs and the possibility of a successful reorganization by going on strike.¹⁵¹ The dissent, on the other hand, cites the case of Continental Airlines as the premiere example of labor strife resulting directly from the employer's unilateral termination of a contract upon filing bankruptcy.¹⁵² Furthermore, the Court majority may not be as anxious to discourage strikes today as it has been in the past because of the ease with which employers are currently able to replace striking employees.¹⁵³ In these days of economic woe, particularly in those industries with frequent bankruptcies, a strike generally means permanent replacement of the unionized employees with new employees hired at lower wages and benefits—just the result the employer may want and need for a successful reorganization.

In addition to departing from its traditional protection of labor contracts, *Bildisco's* holding that both the labor agreement and the provisions of section 8(d) become unenforceable the day the debtor files bankruptcy significantly alters the balance of economic power between the debtor and the union. In the nonbankruptcy context, once a union has been chosen by a group of employees, the employees either have the right to compel the employer to bargain with them or they have the protection of a collective bargaining agreement. The employer's freedom to make unilateral changes is limited to those contained in its final bargaining proposals only if impasse is reached and no contract has been agreed upon. By limiting the scope of changes to those presented in bargaining, the union has had an opportunity to evaluate the proposed changes and to decide whether to accept them. The union retains a further measure of control in the normal bargaining context by virtue of the fact that, by altering its bargaining position, it can eliminate any impasse and force the employer back to the table. If bargaining is eventually successful and a contract signed, the employees exchange their rights to bargain over working conditions for the protection offered by the terms of a collective bargaining agreement with its grievance and arbitration enforcement mechanisms.

Under *Bildisco*, the employees and their union have lost both of these fundamental protections. On the one hand, the employees cannot enforce their contract under section 301 by compelling arbitration of grievances, because the court has said the contract is unenforceable except through the bankruptcy claims procedure.¹⁵⁴ On the

151. For figures on the dramatic decline in the annual number of strikes, see *supra* note 8. The recent Wheeling-Pittsburgh Steel strike, however, is an example of a union and its members willing to risk liquidation of an employer by a strike. See *infra* note 317.

152. See *supra* note 145.

153. When employees go on strike, the employer may not fire or terminate the strikers, but it may hire permanent replacements in their stead. *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333 (1938). When employees offer to return to work at the end of the strike, the employer is not obligated to lay off the permanent replacements. The employer is only required under the NLRA to reinstate the strikers when or if future vacancies occur. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *Laidlaw Corp.*, 171 N.L.R.B. 1366, *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

154. Although the contract's arbitration provisions may no longer be judicially enforceable, the bankruptcy court, either in its discretion or on stipulation of the parties pursuant to Bankruptcy Rule 9019(c), could authorize referral of any claims for breach of the collective bargaining agreement to a labor arbitrator under the contract's arbitration provisions. The arbitrator's role would be to evaluate the merits of the claim under the contract and determine the amount of any monetary award. This award would then be filed as a claim in the bankruptcy proceeding, with the bankruptcy court ruling

other hand, the employees and their union cannot force the employer to bargain by filing unfair labor practice charges under section 8(a)(5) because the Supreme Court has said the provisions of the NLRA must give way to the exigencies of bankruptcy. The Court has thereby created a gap period during which the employer is not bound by either a contract or a bargaining obligation. Instead, the employer is free to make unlimited unilateral changes, a situation unthinkable under labor law.

The effect of the Court's opinion is to maximize the employer's economic power by permitting the employer to make these unlimited changes before it must make reasonable efforts to reach agreement on contract modifications or begin bargaining for a new contract. The majority of the Court was of the view that allowing an employer to reject its collective bargaining agreement, without giving it the right to immediately reduce wages and benefits, "would largely, if not completely, undermine whatever benefit the debtor-in-possession otherwise obtains by its authority to request rejection of the agreement."¹⁵⁵ The Court has put the employer in the strongest possible negotiating posture vis-a-vis the union by allowing it to implement its own reduced wage package *before* coming to the bargaining table.

The Court's imposition in Part I of *Bildisco* of an obligation on the employer to make reasonable efforts to negotiate contract modifications is inconsistent with its imposition in Part II of a duty to bargain for a new contract, a duty which arises pending a ruling on rejection. The Court has subjected the parties to contradictory obligations during the same period of time: to bargain over contract modifications on the one hand, and over a new contract on the other. Furthermore, by suggesting that the duty to bargain for a new contract may attach before rejection is granted, the Court seems to be assuming that the bankruptcy court will always grant rejection of the old contract. There would be no need to bargain for a new contract if the bankruptcy court denies rejection. If rejection is truly an open question, the duty to bargain for a new contract should not begin until rejection of the old has already been granted. Perhaps the majority is taking the position that if no voluntary modifications are agreed upon before rejection, then rejection should be granted. In the Court's view, giving the debtor whatever freedom it needs to save its business may always be more important than preserving an old collective bargaining agreement which the debtor no longer wants.

The impact of the *Bildisco* opinion is not limited to its effect on the bargaining relationship between the debtor and the union. The Court has also eliminated both the NLRA provisions and the collective bargaining agreement from serving as the basis for any first priority employee claims for administrative expenses. Despite Justice Rehnquist's disclaimer that priority of claims is not the primary issue of the rejection controversy,¹⁵⁶ his rationale for refusing to enforce section 8(d) rested on the perceived need to eliminate section 8(d) as a source for administrative expense claims. After a very confusing discussion of the effects of either rejecting or assuming a contract on the priority of any claims arising under the contract, he concluded that,

on its allowance and its priority. For a discussion of this possibility after the *Bildisco* decision, see Berger, *The Collective Bargaining Agreement in Bankruptcy: Does the Duty to Arbitrate Survive?*, 35 LAB. L.J. 685 (1984).

155. 465 U.S. 513, 529 (1984).

156. *Id.* at 531-32.

“though the Board’s action is nominally one to enforce § 8(d) of that Act, the practical effect of the enforcement action would be to require adherence to the terms of the collective bargaining agreement.”¹⁵⁷ Justice Rehnquist offered no explanation for this conclusion. The dissent interpreted this statement to mean that because any back pay awards for section 8(d) violations will be entitled to first priority as an administrative expense, financial pressure on the debtor to abide by the agreement will necessarily follow.¹⁵⁸ The majority’s assumption that an employer will refrain from modifying a contract in violation of section 8(d), because it would thereby create employee administrative expense claims, is not borne out by the facts of *Bildisco* itself or numerous other rejection cases.¹⁵⁹ One is left with the firm impression, nonetheless, that a significant factor in the majority’s resolution of the section 8(d) issue was the elimination of any possibility that section 8(d) would serve as the basis for employee administrative expense claims.

In addition to making any NLRA obligations unenforceable, the majority opinion also attached great importance to making the collective bargaining agreement itself unenforceable immediately upon the debtor’s bankruptcy filing. The necessity of making the contract unenforceable was again presumably based on Justice Rehnquist’s view regarding the priority to be given to claims for breach of contract. Several of Justice Rehnquist’s premises seem flawed. For example, he apparently presumed that a debtor must either reject or assume every executory contract.¹⁶⁰ The dissent, on the other hand, was of the opinion that in some cases a contract may simply “ride through” a Chapter 11 bankruptcy and be binding on the debtor even after discharge is granted.¹⁶¹ When a debtor-in-possession neither rejects nor assumes an executory contract, the general rule has been that the contract remains in effect during the bankruptcy proceedings and passes through the bankruptcy unaffected.¹⁶²

157. *Id.* at 532.

158. *Id.* at 551 & n.19. For such back pay awards to receive first priority as an administrative expense, however, the back pay must be attributable to services rendered during administration of the estate (*i.e.*, after the bankruptcy petition was filed). NLRB back pay awards are entitled to the same priority to which the wages they represent would be entitled. *Nathanson v. NLRB*, 344 U.S. 25 (1952). If the back pay awards are in lieu of wages which would have been earned during administration, but for the employer’s unfair labor practice, then they are entitled to the administrative expense priority.

159. As in *Bildisco*, *supra* notes 80–81 and accompanying text, many employers have modified or breached their collective bargaining agreements before filing bankruptcy. These employers have not begun abiding by the contracts during bankruptcy in order to avoid creating any additional administrative expense claims. *See, e.g., In re Midwest Emery Freight Sys.*, 48 Bankr. 566 (Bankr. N.D. Ill. 1985) (employer reduced employee wages and performed union work with nonunion employees); *In re C & W Mining Co.*, 38 Bankr. 496 (Bankr. N.D. Ohio 1984) (stopped paying health insurance premiums and workmen’s compensation contributions); *In re Tinti Const. Co.*, 29 Bankr. 971 (Bankr. E.D. Wis. 1983) (performed union work with nonunion employees); *In re Commercial Motor Freight*, 27 Bankr. 293 (Bankr. S.D. Ind. 1983) (announced unilateral reduction of wages); *In re Southern Elec. Co.*, 23 Bankr. 348 (Bankr. E.D. Tenn. 1982) (violated seniority provisions of collective bargaining agreement); *In re Louis F. Sammarco Elec. Co.*, 109 L.R.R.M. (BNA) 3288 (Bankr. W.D. Tenn. 1982) (performed union work with nonunion employees); *In re Connecticut Celery Co.*, 106 L.R.R.M. (BNA) 2847 (Bankr. D. Conn. 1980) (ceased payments to pension and health and welfare funds).

160. 465 U.S. 513, 531 & n.13 (1984).

161. *Id.* at 546 n.12.

162. *See, e.g., Federal’s, Inc. v. Edmonton Inv. Co.*, 555 F.2d 577, 579 (6th Cir. 1977); *Smith v. Hill*, 317 F.2d 539, 542 n.6 (9th Cir. 1963); *Hotz v. Federal Reserve Bank*, 108 F.2d 216, 219 (8th Cir. 1939); *Consolidated Gas Elec. Light & Power Co. v. United Ry. & Elec. Co.*, 85 F.2d 799, 805 (4th Cir. 1936). Perhaps *Bildisco* will alter this rule for contracts other than collective bargaining agreements.

The question whether a contract must be either assumed or rejected, or whether it may simply "ride through" a Chapter 11 reorganization, also affected the majority's view of what claims receive first priority as administrative expenses. Justice Rehnquist's discussion of contract claims in bankruptcy implied that if the contract is assumed, all contract damages and liabilities, not just those expenses attributable to wages and other forms of compensation earned during the period of administration, will be administrative expenses.¹⁶³ Under this construction, if rejection is not granted, any claims under the contract for severance pay, medical or retirement benefits, pension plan withdrawal liability, or any other claims would become administrative expenses regardless whether they were claims based on services rendered during the administration of the estate. This would increase substantially the first priority claims over what appears to be the current law. In the dissent's view, and under the majority of court decisions which have decided the issue, only contract claims for wages and benefits attributable to services rendered during administration are entitled to first priority.¹⁶⁴ Justice Rehnquist's implication that if the contract is not rejected it is assumed, and that all breach of contract claims become administrative expenses, is not supported by the language of section 365 or by case law. Nevertheless, to eliminate the possibility that this would occur, the majority simply declared the contract unenforceable the day the debtor files bankruptcy.

Despite the majority's insistence that it was attempting to accommodate both labor law and bankruptcy, no accommodation of labor law seems to have occurred. As the dissent emphasized, the Court recognized only the employer's bankruptcy rights, and avoided several logical ways of accommodating both bankruptcy and labor law. Under the dissent's accommodation, the NLRA would remain enforceable, and the contract would remain in effect until the bankruptcy court granted rejection. The Court also failed to consider a second approach which would provide some accommodation of labor law principles, but would give greater flexibility to the debtor than the dissent's position. If the collective bargaining agreement becomes unenforceable with the bankruptcy filing, then the duty to bargain for a new contract under section 8(a)(5) should also attach with the bankruptcy petition. Under this accommodation, however, the employer would not be free to make immediate and unilateral changes in working conditions. Instead, the employer would first have to bargain to impasse, delaying, but not denying, this employer prerogative. This accommodation would make the employer's labor law obligations during bankruptcy comparable to, if not the same as, the employer's obligations when a contract expires by its own terms.

Because impasse in this emergency context may be reached quickly, requiring the employer to bargain to impasse on proposed changes may not protect employees' wages and benefit levels for any significant amount of additional time. Imposing this

163. 465 U.S. 513, 531-32 (1984).

164. *Id.* at 546. See *supra* note 57 and cases cited therein. Whether the Court's erroneous presumptions about automatic assumption of the contract in the absence of rejection, or its statement that all liabilities under an assumed contract are entitled to the administrative expense priority, will be carried over to other bankruptcy cases outside the collective bargaining context remains to be seen.

duty to bargain, however, is important because it recognizes the legitimate role the union has been given by the NLRA in representing the employees and the limitations the Act imposes on employer action. It accords the union that fundamental level of respect and consideration mandated by labor law statutes and national labor policy. Furthermore, by enforcing an impasse requirement instead of requiring only reasonable efforts, and by imposing the requirement *before* instead of after any changes have been made, greater pressure would be placed on the employer to bargain with a degree of seriousness it may otherwise lack. Such an accommodation would have preserved a more equal bargaining relationship between the debtor and the union consistent with the NLRA.

VI. THE 1984 BANKRUPTCY CODE AMENDMENTS ON COLLECTIVE BARGAINING AGREEMENTS

The Supreme Court's five-to-four split in *Bildisco*, allowing an employer to terminate a collective bargaining agreement unilaterally and declaring the contract unenforceable under the NLRA, created a storm of protest from the labor community. Bankruptcy legislation was already pending in Congress in the spring of 1984 due to the bankruptcy courts' jurisdictional crisis created by the 1982 Supreme Court opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*¹⁶⁵ Congress continued to pass temporary extensions of the interim jurisdiction of the bankruptcy court system in March, April, May, and June of 1984, while it attempted to pass permanent legislation in the aftermath of *Bildisco*.¹⁶⁶ The House and Senate reached general agreement on the jurisdictional amendments to the Bankruptcy Code in March, when the House of Representatives passed H.R. 5174.¹⁶⁷ The debate over collective bargaining agreements in bankruptcy continued, however, and was eventually resolved by a joint House and Senate conference committee on June 28, 1984, one day *after* all previous jurisdictional extensions of the bankruptcy system had expired.¹⁶⁸ Both houses of Congress passed the conference committee's compromise on June 29, 1984, and it was signed into law by the President on July 10, 1984.¹⁶⁹

165. 458 U.S. 50 (1982). In *Marathon*, a plurality of the Court had held that under the Constitution the broad jurisdiction given bankruptcy courts under the 1978 Bankruptcy Code may be exercised only by article III courts. Bankruptcy judges created by the Bankruptcy Code were not article III judges, as they did not have life tenure or protection against the diminution of their salary. Therefore, the 1978 jurisdictional grant to the bankruptcy courts was unconstitutional. The court stayed the effect of the judgment, however, from June 28, 1982, initially until October 4, 1982, and then until December 24, 1982, to allow Congress time to reconstitute the bankruptcy system. *Id.* at 88; 459 U.S. 813 (1982).

166. See Pub. L. No. 98-249, 98 Stat. 116 (March 31, 1984) (jurisdiction extended until May 1); Pub. L. No. 98-271, 98 Stat. 163 (April 30, 1984) (extended until May 26); Pub. L. No. 98-299, 98 Stat. 214 (May 25, 1984) (extended until June 21); Pub. L. No. 98-325, 98 Stat. 268 (June 20, 1984) (extended until June 27).

167. H.R. 5174, 98th Cong., 2d Sess., 130 CONG. REC. H1832-43 (daily ed. March 21, 1984).

168. 130 CONG. REC. S8887, H7490 (daily ed. June 29, 1984).

169. CONG. REC. at S8900, H7500; Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 392 (1984); 126 BANKR. L. REP. (CCH) 2 (July 12, 1984). For a thorough description of the legislative activity resulting in the enactment of § 1113, see Rosenberg, *Bankruptcy and the Collective Bargaining Agreement—A Brief Lesson in the Use of the Constitutional System of Checks and Balances*, 58 AM. BANKR. L.J. 293, 312-21 (1984).

The new section 1113 on collective bargaining agreements is an entirely new section which significantly alters the law as it existed after *Bildisco*.¹⁷⁰ In brief, the section does four things: (1) it specifies that the collective bargaining agreement remains in effect and cannot be unilaterally terminated by the employer during bankruptcy; (2) on the other hand, it allows the bankruptcy court to approve interim changes pending a ruling on rejection; (3) it sets up a new bargaining procedure under which the employer must propose, prior to filing an application for rejection, necessary modifications to the collective bargaining agreement; and (4) it adopts,

170. The text of § 1113 provides:

Rejection of collective bargaining agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section 'trustee' shall include a debtor in possession), shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees [sic] benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection

(d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

with two preconditions and a slight change in wording, the "balance of the equities" standard for rejection of the collective bargaining agreement. Each of these four areas will be examined in terms of its meaning under the new law and in terms of the impact on the employer's obligation under the NLRA.

A. The Prohibition on Unilateral Termination of the Collective Bargaining Agreement

Congress explicitly overruled that portion of the *Bildisco* opinion allowing an employer unilaterally to terminate or modify its collective bargaining agreement. Section 1113(f) provides:

No provision of this title shall be construed to permit a trustee [or debtor-in-possession] to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.¹⁷¹

In addition, the statute describes the collective bargaining agreement as remaining in effect until an application for rejection is ruled on by the court.¹⁷²

The 1984 amendments, however, were by no means a clear victory for labor. As part of the thirteenth hour compromise on the bankruptcy package, Congress protected the contract for only a limited period of time. First, Congress sought to speed up the rejection process by establishing explicit time limits for the bankruptcy court to hear and rule on a rejection application. A hearing on rejection must be held by fourteen to twenty-one days after the application for rejection is filed.¹⁷³

Second, the old contract, the one still in effect, is protected for only an additional thirty days after the beginning of the hearing on rejection. Section 1113(d)(2) provides that, if the court does not rule on an application for rejection within thirty days after commencement of the rejection hearing, "the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on the [rejection] application."¹⁷⁴ Note that this unilateral alteration or termination by the debtor is temporary pending a final ruling by the court on rejection.¹⁷⁵

171. 11 U.S.C.A. § 1113(f) (West Supp. 1985). Section 1113(a) provides that the term "trustee" includes a debtor-in-possession.

172. 11 U.S.C.A. § 1113(e) (West Supp. 1985).

173. 11 U.S.C.A. § 1113(d)(1) (West Supp. 1985). The court may extend this period by seven days "where the circumstances of the case and the interests of justice require." The time may be extended for more than seven days, but only if the parties agree. *Id.*

174. 11 U.S.C.A. § 1113(d)(2) (West Supp. 1985). This 30-day period may be extended, but only by agreement of the trustee or debtor-in-possession.

175. This exception to the prohibition on unilateral changes in § 1113(f) is a revised version of a provision offered by the National Bankruptcy Conference and introduced into the Senate by Senators Thurmond and Heflin. 130 CONG. REC. S6107 (daily ed. May 21, 1984) (text of proposed amendment No. 3083, by Sen. Thurmond and Sen. Heflin, to HR 5174). Under the National Bankruptcy Conference's proposed language, the collective bargaining agreement would have automatically ceased to be in effect 30 days after an application for rejection was filed. *Id.*, § 561(2). The final language, allowing a debtor to alter or terminate a collective bargaining agreement 30 days after commencement of the hearing, protects the contract for an additional 14 to 21 days, unless the debtor agrees to a longer period of time.

Furthermore, under the National Bankruptcy Conference's proposal, this unilateral action by the debtor would have been permanent, not subject to the ruling on rejection. 130 CONG. REC. S6126 (daily ed. May 21, 1984) (Thurmond amendment, § 561(2)).

In summary, the effect of the 1984 amendments is to prohibit unilateral employer action vis-a-vis the contract for a limited period of time after the employer files bankruptcy but before the employer files for rejection, and while the employer's rejection application is pending. The employer controls the actual time period the old contract remains in effect because the relevant time limits are triggered by the employer's filing for rejection. The union and the employees can be sure of no more than forty-four to fifty-one days of protection under the old contract once the employer petitions for rejection.¹⁷⁶ In addition, at least some time will elapse between the bankruptcy filing and the rejection filing because under section 1113 an employer may no longer file an application for rejection of its collective bargaining agreement contemporaneously with its bankruptcy petition. It must first make its proposal to the union under the new prerejection bargaining procedures discussed below.¹⁷⁷

It is hoped that the bankruptcy courts will understand the need for making prompt decisions on the rejection applications they hear. As Senator Packwood characterized the thirty day post-hearing period in the discussion of the conference report, the onus of allowing the debtor to make unilateral changes in the contract will fall on the bankruptcy court due to its delay in ruling on the application; only where "the court wrongly fails to decide the rejection application in the prescribed time" may the trustee terminate or alter any contract provisions.¹⁷⁸ Senator Packwood also pointed out some of the ramifications of the debtor making such unilateral changes pending a rejection ruling:

Obviously if the court ultimately refuses to approve rejection of the contract, then the trustee will have to pay back any wages or benefits withheld unilaterally and unpaid wages and benefits will be treated as costs of administration. In addition, if the trustee makes any such unilateral changes, than [sic] the union is also free to engage in strike activity since its no-strike obligation would no longer be binding.¹⁷⁹

176. The hearing must be held in 14 to 21 days, with the court having 30 days to rule.

177. § 1113(b)(1) provides:

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee . . . shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement . . . and

(B) provide . . . the representative of the employees with such relevant information as is necessary to evaluate the proposal.

Theoretically, the bankruptcy petition could be filed, the proposal be made, the relevant information given to the union, and the rejection application filed all in one day, as long as these events took place in the correct sequence. Normally, however, one would assume the debtor would undertake these various tasks over a period of several days, thus filing its rejection application several days after its bankruptcy petition. White suggests that, in addition to making the proposal and providing the union with the relevant information, the debtor may have to wait for the union to have time to evaluate the proposal before filing for rejection. White, *supra* note 65, at 119 n.93.

In *In re Wheeling-Pittsburgh Steel Corp.*, 119 L.R.R.M. (BNA) 3277 (Bankr. W.D. Pa. 1985), *aff'd*, 120 L.R.R.M. (BNA) 2198 (W.D. Pa. 1985), the union argued that a 22-day period between the date the debtor gave its bargaining proposal to the union and the date it filed its petition to reject the contract indicated bad faith bargaining by the debtor over the proposal. Both the bankruptcy court and the district court rejected this argument. The district court pointed out that "§ 1113 has no time restraint relative to when the debtor, following the submission of a proposal, may file its rejection application." 120 L.R.R.M. at 2204.

178. 130 Cong. Rec. S8898 (daily ed. June 29, 1984) (statement of Sen. Packwood).

179. *Id.* Senator Packwood is correct about the administrative expense priority, but is not correct about the union's right to strike if the employer only modifies the contract and does not terminate it. The union may still be bound by the contract's no-strike clause, with the right to grieve and arbitrate the modification as a breach of the contract. See *supra* note 47 and accompanying text.

Furthermore, as pointed out by two of the House members in their analysis of the compromise bill, the courts are expected as a matter of course to meet the time limits, but in the unlikely event that a court should not do so, expeditious mandamus relief would be available in the appellate courts.¹⁸⁰

It is likely that under the provisions of section 1113(d)(2) a failure by the bankruptcy court to rule on rejection within thirty days of the rejection hearing will be tantamount to an approval of the application for rejection. It will be interesting to see whether bankruptcy judges take advantage of this time limit to rule by default without making a timely decision. Although it is theoretically possible that a court could still deny rejection, even after the thirty days had passed and the debtor had unilaterally terminated the contract, this seems very unlikely. The resurrection of the collective bargaining agreement would assure that any employee claims for lost wages and benefits resulting from any employer reductions would be treated as first priority expenses of administration.¹⁸¹ The pressure on the bankruptcy court will be just the opposite—to approve rejection so that the reasonable value of services rendered during administration are the reduced amount the debtor is paying, not the previous contract rate. In addition, ultimate rejection of the contract will assure that any claims for breach not otherwise entitled to administrative expense priority will relate back to the date the bankruptcy petition was filed and become prepetition, unsecured claims entitled to only the more limited wage or fringe benefit priorities.¹⁸²

B. *The Duty to Bargain Prior to Rejection*

Aside from overruling the second part of *Bildisco* by prohibiting immediate and unilateral termination of the contract by the employer, the major thrust of section 1113 is to require the debtor-employer and the union to bargain over modifications in the existing collective bargaining agreement before allowing a bankruptcy court to rule on rejection. The language creating this rather strange bargaining process was taken from Senator Packwood's proposed amendment, offered in May 1984.¹⁸³ This new bargaining procedure contains the operative NLRA language establishing the duty to bargain in good faith, but it sets up a bargaining framework more like the one-sided final offer arbitration procedure occasionally found in public sector collective bargaining.¹⁸⁴ The heart of section 1113 is subsection (b):

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession . . . shall—

180. 130 CONG. REC. H7496, S8899 (daily ed. June 29, 1984) (statement of Rep. Hughes and Rep. Morrison on H.R. 5174).

181. It is possible that even with rejection the amount of wages lost could serve as an administrative expense claim. See *supra* notes 57–58.

182. 11 U.S.C. § 507(a)(3) (third priority for wages), § 507(a)(4) (fourth priority for benefits). See *supra* note 60.

183. 130 CONG. REC. S6181 (daily ed. May 22, 1984).

184. Final offer arbitration is an impasse resolution technique in which each side's final offer is presented to an arbitrator. The arbitrator may not create a compromise position, but must choose between the offers presented. In some cases the choice is made issue by issue. In others, an entire package must be chosen. P. FEUILLE, *FINAL OFFER ARBITRATION* (Public Employee Relations Library No. 50, 1975). See also H. EDWARDS, R. CLARK & C. CRAVER, *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 620–21, 622–23 (2d ed. 1979), and sources cited therein.

(A) *make a proposal* to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those *necessary modifications* in the employees [sic] benefits and protections that are *necessary to permit the reorganization* of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide . . . the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal . . . and ending on the date of the hearing [on rejection], the trustee shall *meet, at reasonable times*, with the authorized representative *to confer in good faith* in attempting to reach mutually satisfactory modifications of such agreement.¹⁸⁵

Section 1113 provides in subsection (c) that a bankruptcy court shall approve an application for rejection only if (1) the debtor has made a proposal under subsection (b), (2) the employee representative "has refused to accept such proposal without good cause," and (3) the balance of the equities clearly favors rejection.¹⁸⁶

1. *The Scope of the Required Proposal*

a. *The Proposal is Limited to Modifications "Necessary" to Permit Reorganization*

Under this new bargaining procedure, the first requirement is that the debtor-employer make a proposal which contains only those modifications necessary to permit the debtor's reorganization.¹⁸⁷ Senator Packwood indicated that this concept was based on a recommendation by Professor Countryman and Mr. Bordewieck in their article on rejection of collective bargaining agreements:

185. 11 U.S.C.A. § 1113(b) (West Supp. 1985) (emphasis added).

186. 11 U.S.C.A. § 1113(c) (West Supp. 1985). In *In re American Provision Co.*, 44 Bankr. 907 (Bankr. D. Minn. 1984), the first reported rejection case under § 1113, the court analyzed the new statute by breaking it down into nine requirements:

While § 1113 is not a masterpiece of draftsmanship, I think nine requirements for court approval of the rejection of collective bargaining agreements can be gleaned from § 1113.

1. The debtor in possession must make a proposal to the Union to modify the collective bargaining agreement.

2. The proposal must be based on the most complete and reliable information available at the time of the proposal.

3. The proposed modifications must be necessary to permit the reorganization of the debtor.

4. The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably.

5. The debtor must provide to the Union such relevant information as is necessary to evaluate the proposal.

6. Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the Union.

7. At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.

8. The Union must have refused to accept the proposal without good cause.

9. The balance of the equities must clearly favor rejection of the collective bargaining agreement.

Id. at 909 (footnotes omitted).

187. 11 U.S.C.A. § 1113(b)(1)(A) (West Supp. 1985). Senator Packwood's original language contained in his May 22 amendment limited the required proposal to minimum modifications that would permit reorganization. 130 CONG. REC. S6181 (daily ed. May 22, 1984).

At the very minimum, no bankruptcy court should authorize the rejection of a collective bargaining agreement until the debtor establishes that it bargained in good faith with the union with respect to *modifications* in the collective bargaining agreement *deemed necessary by the debtor for continuation of the business enterprise*, and that the union refused to agree to these modifications.¹⁸⁸

During the debate on the conference committee's report, Senator Packwood emphasized that it was the committee's intent to limit strictly the employer's proposal to necessary modifications:

[O]nly modifications which are necessary to a successful reorganization may be proposed. Therefore, the debtor will not be able to exploit the bankruptcy procedure to rid itself of unwanted features of the labor agreement that have no relation to its financial condition and its reorganization and which earlier were agreed to by the debtor. The word "necessary" inserted twice into this provision clearly emphasizes this required aspect of the proposal which the debtor must offer and guarantees the sincerity of the debtor's good faith in seeking contract changes.¹⁸⁹

Presumably, if the debtor's proposal contains additional items which it may desire, but which are not necessary to reorganization, the proposal does not fulfill the requirements of section 1113(b) and the employee representative would have good cause to refuse to accept the proposal. Thus, under section 1113(c), the bankruptcy court would not be allowed to approve rejection, in the event no agreement on voluntary modifications is reached, if the proposal contains items that are not necessary.

b. *The Debtor Must Continue to Be the Employer*

This requirement, "necessary to permit . . . reorganization," presumes that the debtor will continue to operate the business which is employing those who work under the collective bargaining agreement. It presupposes that the debtor's reorganization proceedings involve a rehabilitation of the business, not a liquidation or a sale of the business to a new employer. Although a reorganization proceeding under Chapter 11 may be pursued for the purpose of liquidation, not rehabilitation, rejection of a collective bargaining agreement should never be allowed under section 1113 if the debtor does not intend to rehabilitate the employing enterprise.¹⁹⁰

188. Bordewick & Countryman, *supra* note 74, at 317, *quoted in* 130 CONG. REC. S6184 (daily ed. May 22, 1984) (emphasis added by author). Note that this description contains both the term "necessary" and the phrase "for continuation of the business," a combination of the "necessary" language used in § 1113(b) and the phrase "essential to the continuation of the business" used in § 1113(e) on interim relief. See *infra* notes 335-37 and accompanying text.

189. 130 CONG. REC. S8898 (daily ed. June 29, 1984). Similarly, in the House, Rep. Morrison stated that § 1113(b) "makes plain that the trustee [or debtor] must limit his proposal to modify a collective bargaining agreement to only those modifications that must be accomplished if the reorganization is to succeed. The key phrase is 'necessary' modifications." *Id.* at H7496.

190. Senator Packwood used the term "successful reorganization" in discussing the "necessity" requirement. The Supreme Court in *Bildisco* talked about "successful rehabilitation" and "successful reorganization" interchangeably, describing either as an alternative to a sale or liquidation:

Since the policy of Chapter 11 is to permit successful rehabilitation of debtors, rejection should not be permitted without a finding that that policy would be served by such action. . . . Determining what would constitute a successful rehabilitation involves balancing the interests of the affected parties—the debtor, creditors, and employees. The Bankruptcy Court must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the employees.

If the debtor is going to liquidate the business by laying off all the employees, terminating its operations, and selling its assets for scrap, it will have no employees left working under the contract. Consequently, no modifications will be necessary because the contract will no longer have any effect on the operation of the business.¹⁹¹ If the employer is unable to meet its contractual obligations during the process of liquidation, the employees will simply be entitled to file administrative claims in the bankruptcy proceedings for any lost wages or benefits using the contract rate as the reasonable value of services rendered.¹⁹² No modifications of the contract will be "necessary to permit reorganization" because no reorganization will be taking place. If one reads section 1113(b) in light of the Supreme Court's emphasis in *Bildisco* on successful rehabilitation and the remarks of the conference committee members on the floor, Congress did not intend the term "reorganization" to include liquidation of the employing unit.¹⁹³

In other Chapter 11 proceedings, the debtor may not liquidate its employing unit, but it may sell the business to a new employer as a functioning operation. In this situation as well, no contract modifications will be necessary to permit reorganization. Under the Supreme Court's labor law successorship doctrines, a buyer of a business concern is not bound by the seller's collective bargaining agreement with its employees unless the buyer expressly assumes the contract. If a successor employer continues to employ a majority of the former owner's employees, it may be under a duty to recognize and bargain with the employees' union, but it is *not* bound by the debtor's collective bargaining agreement.¹⁹⁴ No modifications in the contract will be necessary because the contract will no longer apply to the employees when the buyer takes over the business. If no contract modifications are necessary because no employees will continue to be employed under the contract, then rejection of the contract is precluded.

This requirement that rejection of a collective bargaining agreement is permissible only if the debtor is planning to continue to operate its business may seem obvious, but previously has not been required by the courts under section 365. Some

. . . The Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization . . .

The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.

465 U.S. 513, 527-28 (1984). See also Gibson, *The New Law on Rejection of Collective Bargaining Agreements in Chapter 11: An Analysis of 11 U.S.C. § 1113*, 58 AM. BANKR. L.J. 325, 337-38 n.53 (1984).

191. In *In re Total Transp. Serv.*, 37 Bankr. 904 (Bankr. S.D. Ohio 1984), the court ruled that rejection of the collective bargaining agreement was not possible because no more employees were going to be employed under the contract. The court found that because all employees had been laid off and the business had ceased, the contract was no longer executory, and therefore was not eligible for rejection. *Id.* at 906. The court also found that in the alternative the balance of the equities did not favor rejection because it would serve no rehabilitative purpose. *Id.* at 907.

192. See *supra* notes 57-58.

193. This interpretation of § 1113(b) is reinforced by the language of § 1113(e) which specifies that interim relief from the contract's terms may be authorized by the court only if it is "essential to the continuation of the debtor's business." 11 U.S.C.A. § 1113(e) (West Supp. 1985).

194. See *supra* note 42. In addition, the buyer is free to set new initial terms of employment, reducing the wages and benefits the employees were receiving under the contract with the debtor. In this situation, only the debtor-as-seller remains obligated under the collective bargaining agreement. The union and employees may pursue arbitration against the seller, seeking an award of damages for any breach, including a breach of any clause that the contract will be binding on the employer's successors or assigns. *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249 (1974). This award could then be presented in bankruptcy as a claim against the estate.

bankruptcy courts have granted rejection primarily to allow the debtor-in-possession to sell the business free of the restrictions of the collective bargaining agreement.¹⁹⁵ If the debtors, their lawyers, or the bankruptcy courts had been aware of or had properly applied the doctrine of successorship under labor law, they would have realized that rejection was not necessary in order for the buyer to purchase the business free of the collective bargaining agreement.¹⁹⁶ In the event of a liquidation or sale, the effect of rejection is limited to the possibility of converting some of the employees' claims against the debtor for breach of the contract from first priority administrative expense claims to prepetition claims with third, fourth, or no priority.¹⁹⁷ Under section 1113, this possible change in the priority of employee claims is not sufficient, by itself, to justify rejection. Section 1113 was drafted on the assumption that the debtor will be attempting to rehabilitate its business and will continue to have persons employed under the collective bargaining agreement, thereby necessitating contract modifications.

c. Financial Impact is Needed for Modifications to be "Necessary"

The few court opinions issued under section 1113 indicate that in order to find that proposed modifications are necessary, the debtor must introduce financial evidence showing that the modifications will have a significant monetary impact on improving the debtor's financial condition.¹⁹⁸ In *In re American Provision Co.*,¹⁹⁹ the court denied rejection, finding the proposed modifications not necessary to the debtor's reorganization because they would have saved the debtor only around two percent of

195. In *In re J.R. Elkins, Inc.*, 27 Bankr. 862 (Bankr. E.D.N.Y. 1983), the court found that in order for the debtor to reorganize under Chapter 11, "a buyer must be found quickly." The court continued:

The evidence presented indicates that a prospective buyer has made a firm offer to purchase the debtor's assets.

That offer is, however, conditioned on a renegotiation of the collective bargaining agreement between the debtor and the Union. The purchaser is adamant in its refusal to assume the agreement as it now exists. If this renegotiation is not accomplished the offer will be withdrawn.

Id. at 863. Likewise, in *In re Concrete Pipe Mach. Co.*, 28 Bankr. 837 (Bankr. N.D. Iowa 1983), the court granted rejection in part because, the court explained, "[t]he prospective purchasers of the company have declined to make binding offers while the collective bargaining agreement is still in effect. It is virtually certain that no purchasers can be found if the collective bargaining agreement is not rejected." *Id.* at 839.

196. The only court to recognize explicitly that rejection may not be necessary in this situation has been the Ninth Circuit in *Local Joint Executive Bd. v. Hotel Circle*, 613 F.2d 210 (9th Cir. 1980). There, the receiver had negotiated a proposed sale of the hotel with the sale conditioned on the purchaser taking clear of any existing collective bargaining agreement. *Id.* at 212. The court commented: "In some cases the bankruptcy court will not need to reach the rejection issue. . . . Under *Burns* and other cases, there may not be a need for the bankruptcy court to act any further as the new owner may be insulated under the successor employer doctrine." *Id.* at 214 n.3. Nevertheless, the court affirmed the bankruptcy court's approval of rejection.

In a recent case under § 1113, *In re Fiber Glass Indus.*, 49 Bankr. 202 (Bankr. N.D.N.Y. 1985), the reorganization of the debtor was premised on a sale of corporate stock to new management, not sufficient to make the new owner a successor employer. As in the above cases, however, the completion of the transaction was premised on rejection of the collective bargaining agreement. The court, however, refused to be bound by this condition, stating that: "This Court cannot subordinate the statutory standard outlined in § 1113 for rejection of a collective bargaining agreement to a condition in a contract clearly inserted for [the new chief executive officer's] benefit and capable of being waived by him." *Id.* at 207.

197. See *supra* notes 57, 60.

198. The one exception is the five-year contract term proposed in *Wheeling-Pittsburgh Steel*. See *infra* notes 208-15 and accompanying text.

199. 44 Bankr. 907 (Bankr. D. Minn. 1984).

its monthly operating expenses.²⁰⁰ In *In re K & B Mounting, Inc.*,²⁰¹ rejection was denied, in part, because the debtor did not introduce any detailed financial evidence supporting the necessity of its proposal, relying solely on its bankruptcy filings.²⁰² On the other hand, the court in *In re Allied Delivery System Co.*,²⁰³ found the debtor's proposed modifications necessary based on its general conclusion that the proposed modifications would have "substantially reduced" the debtor's labor costs, which constituted approximately eighty-seven percent of its gross revenues.²⁰⁴

Thus, the focus of the "necessity" requirement has been on the monetary impact of any changes on the debtor's financial condition.²⁰⁵ At issue should be the economic items contained in a collective bargaining agreement, not its noneconomic provisions.²⁰⁶ Under section 1113(b), changes in noneconomic items, such as work rules, seniority, and grievance and arbitration procedures, would not come within the scope of the permissible proposal unless the debtor can establish a clear monetary impact on reorganization.²⁰⁷

200. *Id.* at 910.

201. 50 Bankr. 460 (Bankr. N.D. Ind. 1985).

202. *Id.* at 467-68. Similarly, in *In re Fiber Glass Indus.*, 49 Bankr. 202 (Bankr. N.D.N.Y. 1985), the court found that the debtor's cost reduction proposal was presented "without any specifics supporting the reductions except an obvious need to control operating expenses." *Id.* at 206. The court continued:

Merely demonstrating a resultant savings to the debtor to justify a modification does not appear to meet the statutory standard without the additional showing that but for this particular savings reorganization cannot be achieved. No evidence was offered by the debtors as to how the precise figure of \$130,000 was keyed into an overall plan of reorganization.

Id.

203. 49 Bankr. 700 (Bankr. N.D. Ohio 1985).

204. *Id.* at 702. According to the court's opinion, when current employee pension and health and welfare benefits were included, the union labor costs exceeded 100% of the debtor's gross revenues. *Id.*

205. See also Gibson, *supra* note 190, at 337.

206. The distinction between the economic and noneconomic provisions of a collective bargaining agreement is one generally followed in the bargaining process. Economic items, which include those "directly susceptible to monetary evaluation, such as wages, vacations, holidays, and pension and welfare contributions," are customarily considered only after agreement has been reached on noneconomic items. Hart, *Techniques of Collective Bargaining*, PRAC. LAW., Jan. 15, 1980, at 9, 17. Noneconomic items include such things as a "management rights" clause, grievance and arbitration provisions, union security, a no-strike promise, and seniority provisions. *Id.*; Federal Mogul Corp., 212 N.L.R.B. 950, 952 (1974), *enforced*, 524 F.2d 37 (6th Cir. 1975).

207. In one recent case, *In re Salt Creek Freightways*, 47 Bankr. 835 (Bankr. D. Wyo. 1985), the union attempted to contest proposed modifications in the grievance procedure, a noneconomic item, as not necessary to reorganization, but failed to offer any evidence in support of its claim. According to the court, the debtor had presented a *prima facie* case that all its proposed changes were necessary for the company to remain in business, and the union failed to carry its burden of producing evidence to rebut this showing. *Id.* at 838. The court did not summarize the financial evidence or indicate what monetary impact the debtor's proposed changes would have, but merely concluded that the debtor's witness established that each of the proposed modifications "impacted upon the debtor's operations and was therefore necessary to enable the debtor to remain in business." *Id.* If this case is any example, once a debtor employer offers evidence that a proposed change in a noneconomic item will have a monetary impact on the company's reorganization, the union must be prepared to offer evidence of its own that this monetary impact will not occur, or will be insignificant, in order to keep the modification of a contract's noneconomic items from being considered necessary.

In analyzing the differing treatment given to a contract's economic items, as opposed to noneconomic items, it is interesting to contrast this opinion of the court on rejection of the debtor's collective bargaining agreement with its earlier opinion authorizing interim changes in the same collective bargaining agreement. See *In re Salt Creek Freightways*, 46 Bankr. 347 (Bankr. D. Wyo. 1985). Finding that the standard for authorizing interim relief, as opposed to rejection, was the stricter standard derived from *REA Express*, the court granted interim relief on economic items only. The court noted that the debtor's proposal to the union contained modifications in several noneconomic provisions, but found that there was no evidence before the court that "these other changes, referred to as 'noneconomic' by the parties, are necessary for the continuation of the debtor's business." *Id.* at 351. Therefore, the court limited the interim changes to reductions in six economic items: wages, health and welfare fund payments, pension fund payments, paid sick leave, paid holidays, and paid vacations. *Id.*

The one major exception so far to a determination of necessity by an examination of the financial impact of the proposals has been the bankruptcy court's evaluation of Wheeling-Pittsburgh's proposal to modify its collective bargaining agreement by extending it for an additional five-year term.²⁰⁸ By the time the company moved to reject the collective bargaining agreement, there were only two issues in dispute: The company's proposal to reduce labor costs from \$21.40 to \$15.20 per hour, and its proposal to extend the contract, with this modification, for an additional five years. The contract would otherwise have expired thirteen months later on July 31, 1986.²⁰⁹ The labor cost proposal had an obvious financial impact. The five-year extension of the contract, however, was supported by testimony on the company's need for labor stability during its reorganization period which, according to the bankruptcy court, was likely to last *at least* five years.²¹⁰ The union's argument that sufficient labor stability could be achieved by negotiating a new three-year agreement when the old one expired fell on deaf ears. The bankruptcy court found that because the reduction in labor costs to \$15.20 per hour was necessary for reorganization, "there is no need, reason, or justification for waiting 13 months for relief from a losing situation."²¹¹

The district court affirmed the bankruptcy court's finding of necessity, finding that the "necessary" standard of section 1113 "does not mean 'absolutely essential'" as the union contended. Instead, in order to prevent the debtor from going into liquidation, with the consequent loss of jobs, Congress intended the "necessary" standard "to be satisfied by consideration of feasibility for reorganization."²¹² Furthermore, the district court held that, even if it may not have made the same findings of fact as the bankruptcy court, the district court on appeal could reverse the bankruptcy court only under the "clearly erroneous" standard.²¹³

The ultimate irony of basing a finding of necessity for a five-year contract term on the need for labor stability was the fact that this finding was one of the steps along the way which made rejection of the collective bargaining agreement possible. Rejection in turn provoked a four-month strike by the Steelworkers Union, which in the view of many observers was virtually certain to hasten the liquidation of the company.²¹⁴ The bankruptcy court discussed the need for labor stability in evaluating the company's proposal without even referring to the possibility of a strike occurring in the event rejection was granted. Even more disturbing was the fact that neither the bankruptcy court nor the district court mentioned or appeared to recognize that, by seeking a five-year contract term, the company was in effect asking the union to relinquish its right to bargain over working conditions for this five-year period. In a field of business changing as rapidly as the steel industry, giving up all bargaining

208. *In re Wheeling-Pittsburgh Steel Corp.*, 120 L.R.R.M. (BNA) 2198 (W.D. Pa. 1985).

209. *Id.* at 2201.

210. *Id.* at 2202 (quoting the Bankruptcy Court's opinion. *See* 119 L.R.R.M. 3277, 3284 (Bankr. W.D. Pa. 1985)).

211. *Id.*

212. *Id.*

213. *Id.* at 2203.

214. *See* Wall St. J., Sept. 23, 1985, at 3, col. 2, and Wall St. J., Oct. 15, 1985, at 17, col. 1; *see also infra* note 322.

rights for such an unusually long period of time was obviously more than the union was willing to concede.²¹⁵

The bankruptcy court must decide whether the debtor's proposed modifications are necessary only if the parties have failed to reach agreement on a modified contract. Therefore, by the time the court hears the evidence on necessity, the real issue before the court is whether the court may proceed to consider and approve the debtor's rejection request. If the court finds that the modifications the debtor has proposed are *not* necessary, then, in effect, the court is denying rejection. If the court finds the proposal contains only necessary changes, then the court is allowing itself to reach the issue of rejection. It is therefore difficult—if not impossible—to divorce a ruling on the necessity requirement from the rejection issue itself. This leads to a certain rigidity and mechanical application of the section 1113 prerequisites to rejection. Because a failure to comply fully with the “necessity” requirement is so severely sanctioned by refusal to reach the rejection issue, courts such as the bankruptcy court in *Wheeling-Pittsburgh Steel* are very reluctant to rule against the debtor. This is one of the built-in weaknesses of section 1113. If the bankruptcy court felt it had other options, such as continuing the hearing, directing the debtor to delete or modify one or more of the specific items in its section 1113(b) proposal, and directing the parties to bargain again, it might be more willing to find that not all the debtor's proposals are necessary.

d. *The Proposal Must Assure Fair and Equitable Treatment*

In addition to containing only those modifications which are necessary, the debtor's proposal must “assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably.”²¹⁶ The phrase “all of the affected parties” was intended primarily, but not exclusively, to include the unionized employees working under the collective bargaining agreement. As Senator Packwood explained, if the employees and their union are reassured that they are not being asked to contribute more than their share of concessions to the reorganization effort, they will be more willing to agree to contract modifications:

This language [assuring fair and equitable treatment] guarantees that the focus for cost cutting must not be directed exclusively at unionized workers. Rather the burden of sacrifices in the reorganization process will be spread among all affected parties. This consideration is desirable since experience shows that when workers know that they alone are not bearing the sole brunt of the sacrifices, they will agree to shoulder their fair share and in some instances without the necessity for a formal contract rejection.²¹⁷

215. Collective bargaining in the steel industry is in a state of flux due to the economic crisis in American steel manufacture and the termination of coordinated bargaining by the five major producers of domestic steel. For the first time in 30 years, each of the major steel companies will be bargaining individually with the Steelworkers Union for new collective bargaining agreements to take effect in July 1986. See Wall St. J., July 22, 1985, at 3, col. 1.

216. 11 U.S.C.A. § 1113(b)(1)(A) (West Supp. 1985).

217. 130 CONG. REC. S8898 (daily ed. June 29, 1984) (remarks of Sen. Packwood). Senator Packwood went on to discuss approvingly the approach one bankruptcy court took in *In re Blue Ribbon Transp. Co.*, 30 Bankr. 783 (Bankr. D.R.I. 1983). In *Blue Ribbon*, the court found that the business would collapse if required to adhere to the collective bargaining agreement. The court, however, made authorization of rejection conditional, requiring that the debtor first reduce excessive management costs by lowering the three owner-managers' salaries, by reducing the number of company

In contrast to this emphasis on the organized employees, those conferees opposed to the prounion amendments wanted to make it clear that this language also includes the debtor's nonunion employees.²¹⁸ Consequently, inclusion of this requirement mandates that the debtor support its section 1113(b) proposal with comparisons between the financial impact the proposed contract modifications will have on its unionized workers, and the impact *other* cost-cutting measures will have on the salaries and perquisites of management and on the wages and benefits of any nonunion employees.²¹⁹

As interpreted by one bankruptcy judge, fair and equitable treatment of all the affected parties, including the various classes of employees, does not mean "identical or equal treatment."²²⁰ In *In re Allied Delivery System*, the union opposed the

cars from seven to one and using the car only for company business, by cancelling company gasoline credit cards, and by limiting the company's contributions to management's medical and pension plans to the same pro rata amount contributed to employees' plans. The court gave the debtor five days to comply, in which event rejection of the contract would be approved. The court's order was to insure that the employees were not the only ones being required to make sacrifices. *Id.* at 787-88.

Another example which Senator Packwood could have used to illustrate fair and equitable treatment was the district court's conditional approval of rejection in *In re Parrot Packing Co.*, 42 Bankr. 323 (N.D. Ind. 1983). In this case the court conditioned rejection on percentage reductions in nonunion employees' compensation to equal the percentage reductions unionized employees had already suffered plus the reduction which would occur as a result of rejection. *Id.* at 334-35. The wages of the organized employees had already been reduced by 28%, whereas some of the nonunion employees' compensation had increased approximately 1% and others' had increased 13% over the past year. *Id.* at 326.

In contrast to these two cases, one bankruptcy court had actually approved rejection of a collective bargaining agreement where, three months before filing bankruptcy and requesting rejection, the company's five officer-owners had each received an annual raise of \$12,000, and the directors had decided to give themselves a director's fee of \$2,500 per quarter. *In re Commercial Motor Freight*, 27 Bankr. 293, 296 (Bankr. S.D. Ind. 1983). The court justified the debtor's actions in these words:

That while the action of Commercial Motor Freight's directors in awarding themselves significant salary increases and other benefits was highly improvident under the circumstances, the court is not of the opinion that such action evinces bad faith; and that, further, the monetary amount involved is de minimus as compared to the total labor costs required by the contracts[.]

Id. at 297. This sequence of events should not be allowed to repeat itself under § 1113.

218. This is most clearly shown in the remarks of Senator Thurmond:

The phrase "all of the affected parties" is obviously not meant to include any party which might conceivably be affected in any minor way, but is intended to encompass those parties directly affected. This phrase clearly includes, however, all nonunion employees of the debtor, whose interests should be as carefully considered by the court as those of any union employees.

130 CONG. REC. S8888 (daily ed. June 29, 1984). Senator Hatch gave a very expansive definition of the term "affected parties": "those parties with a contractual, legal, or financial tie to the debtor." *Id.* at S8892.

219. This requirement to treat all parties fairly and equitably is a revision of Senator Packwood's original language, which required the debtor's proposal to take into account "the best estimate of the sacrifices expected to be made by all classes of creditors and other affected parties to the reorganization." 130 CONG. REC. S6181 (daily ed. May 22, 1984). The criticism of the original Packwood proposal was that it would require the debtor or court to predict at the beginning of the bankruptcy proceeding the impact of a future reorganization plan, regarded as an impossible task at this early stage of the proceedings. The language finally adopted is less specific and allows greater leeway for varying interpretations by bankruptcy judges.

As Senator Hatch explained in opposing the Packwood amendment:

[R]equiring the parties in negotiation—and the court thereafter—to "estimate" the "sacrifices" . . . "to be made by all classes of creditors and other affected parties" is simply unworkable. It stands the chapter 11 proceedings on its head. To me, there is no way, at the outset of a reorganization proceeding, to divine what contributions and sacrifices might be required of all creditors. That is the job of the creditors' committee, of which the union would be a part. At the outset of a chapter 11, all creditors are not even known, nor are the amount of the obligations of the business known. To say at the outset, when the business must solve its cash flow problem to survive, that it must discern what all creditors may eventually have to sacrifice to keep the company alive, in my opinion, is nearly impossible, at least in the more complex bankruptcy situations.

130 CONG. REC. S6191 (daily ed. May 22, 1984) (remarks of Sen. Hatch). See also *id.* at S6187 (remarks of Sen. Dole).

220. *In re Allied Delivery Sys.*, 49 Bankr. 700, 703 (Bankr. N.D. Ohio 1985).

proposed contract modifications as unfair because the unionized employees' wages and benefits were going to be cut approximately twenty percent, while the other employees were not going to suffer as high a percentage reduction. The court rejected the union's argument, finding that the evidence demonstrated that the wages of nonunion employees had been reduced on a graduated basis based on earnings, and that the value of their wages and benefits did not equal that of the union employees, primarily because they did not have a pension plan.²²¹ Similarly, in *In re Salt Creek Freightways*, the bankruptcy court found the debtor's proposal fair and equitable because the company had substantially reduced the wages and benefits of all nonunion employees, including top management.²²² In contrast, one of the reasons the court denied rejection in *In re K & B Mounting* was that the debtor had structured its finances so that, upon filing bankruptcy, it had no secured debts and its only major unsecured debt was to its union employees' health, welfare, and pension plan.²²³ As a result, the debtor's section 1113(b) proposal affected only one party in interest: its unionized employees. As the court said, "The debtor has not shown that its proposal requires all parties directly affected—management, non-union employees, suppliers as well as unionized workers—to sacrifice to a similar degree."²²⁴ The debtor was unsuccessful in evading the obligations of section 1113 through this rather unusual method of paying cash for supplies and equipment, rather than using credit, in order to eliminate most of its debts, except the debt to its union employees, before filing its bankruptcy petition.

The requirement that the proposed modifications treat all parties fairly and equitably parallels the "balancing of the equities" rejection standard itself, and is drawn from general language used by the courts prior to *Bildisco* to explain their rejection standards.²²⁵ Again, this language describing the debtor's required proposal collapses a bankruptcy court's ruling on whether the modification proposal meets these requirements with the court's ultimate ruling on rejection. As Senator Hatch explained in supporting the conference committee's compromise: "This fair and equitable language was intended by the conference to insure that the type of balancing that takes place when the court finally rules on rejection also takes place during these preliminary negotiations."²²⁶ Thus, in ruling on the conditions required prior to rejection, if the court concludes that the debtor's proposal treats all parties fairly and equitably, and, in spite of that, the union has refused to agree, the court will probably approve rejection after again balancing these same equities. On the other hand, if the union is able to rebut the debtor's evidence and sustain its position that the employer's

221. *Id.*

222. 47 Bankr. 835, 839 (Bankr. D. Wyo. 1985).

223. 50 Bankr. 460, 468 (Bankr. N.D. Ind. 1985).

224. *Id.*

225. See, e.g., *In re Bildisco*, 682 F.2d 72, 79-81 (3d Cir. 1982):

[T]he polestar is to do equity between claims which arise under the labor contract and other claims against the debtor; . . . the court must consider the rights of covered employees as supported by the national labor policy as well as the possible "sacrifices which other creditors are making" in the effort to bring about a successful reorganization.

Id. at 81 (quoting *Group of Inst'l Investors v. Chicago, Mil., St. P. & Pac. R.R.*, 318 U.S. 523, 550 (1943)).

226. 130 CONG. REC. S8892 (daily ed. June 29, 1984).

proposal does not treat everyone involved fairly and equitably, then presumably the union will have good cause to refuse to accept the proposal and rejection will not be granted.

2. Disclosure of Information

The section 1113 bargaining procedure also contains provisions requiring the debtor to disclose relevant information to the union to enable it to evaluate the debtor's proposal. Similar disclosure requirements are part and parcel of the duty to bargain in good faith under the NLRA. One may presume these bankruptcy disclosure provisions have their roots in labor law because Congress has integrated them into the prerejection bargaining process, which incorporates the duty to bargain in good faith as found in the NLRA.²²⁷ Section 1113 first provides that the debtor's proposal of necessary modifications must be "based on the most complete and reliable information available at the time of such proposal."²²⁸ Second, after making the proposal, the debtor must "provide . . . the representative of the employees with such relevant information as is necessary to evaluate the proposal."²²⁹ This disclosure requirement is, in turn, qualified by the provisions of section 1113(d)(3):

The court may enter such protective orders, consistent with the need of the authorized representative of the employee[s] to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.²³⁰

The first provision, that the proposal be *based* on the most complete and reliable information available, is not a direct disclosure requirement, but when coupled with the second provision, it describes the same information that the union needs in order to evaluate the proposal. The court in *In re K & B Mounting* collapsed the two requirements into one in its ruling on the debtor's failure to comply:

227. For discussion of the incorporation of the NLRA's duty to bargain into § 1113, see *infra* notes 244-57 and accompanying text. In fact, Senator Thurmond was primarily concerned that the disclosure requirements not go beyond existing labor law disclosure obligations. In response to Senator Packwood's earliest amendment, which contained very similar disclosure requirements, Senator Thurmond remarked:

A question should also be raised regarding subsection (b)(1)(B) requiring the debtor to provide "information necessary to evaluate such proposal." Since relevant information is already available to the unions under existing rules of discovery, I question the necessity of a new statutory provision requiring the release of what may be very sensitive financial information. If this provision is intended to go beyond existing law, I think that fact should be acknowledged, explained, and clearly justified. A concern was raised at our April 10 hearing that this type of requirement might increase an employer's disclosure obligations under the National Labor Relations Act (NLRA). Herbert P. Minkel, testifying on behalf of the National Bankruptcy Conference, stated that, since the requirement to provide information related to the ability to confirm a plan, union representatives may be able to obtain information which they would not be entitled to receive under the NLRA. I suggest that existing law in this area should be maintained.

130 CONG. REC. S6194 (daily ed. May 22, 1984).

228. 11 U.S.C.A. § 1113(b)(1)(A) (West Supp. 1985).

229. 11 U.S.C.A. § 1113(b)(1)(B) (West Supp. 1985). The final compromise version added the word "relevant" to this same phrase as it appeared in the earlier Packwood amendment. See 130 CONG. REC. S6181 (daily ed. May 22, 1984).

230. 11 U.S.C.A. § 1113(d)(3) (West Supp. 1985). This section was first introduced as part of Senator Packwood's amendment. Only minor changes were made in its wording in the final compromise version. See 130 CONG. REC. S6182, § 1113(d)(3) (daily ed. May 22, 1984).

However, neither the union nor the court could assess the necessity of these modifications, since the debtor did not substantiate its proposal with "relevant" information selected from "the most complete and reliable information available" when the debtor made its proposal. As stated above, the debtor's bankruptcy filings are hardly sufficient.²³¹

In order for either the court or the union to determine whether the proposal is based on "the most complete and reliable information," the information serving as the basis of the proposal must be disclosed to both the union and the court.

Questions will no doubt arise concerning the scope of the disclosure requirement. In *K & B Mounting*, the court gave the provisions a fairly broad scope: "The union should be supplied with detailed projections and recommendations, perhaps made by a management consultant, preferably one who is independent of the interested parties. The debtor should present full and detailed disclosure of its difficulties and its proposed short-run and long-run solutions."²³² More specifically, in *In re Fiber Glass Industries*,²³³ the court found that under section 1113 the debtor should have disclosed to the union that it was planning to lay off one-third of the unionized employees: "The anticipated possibility or probability, as it were, that one-third of the Union work force would have to be laid off appears to be 'relevant information,' as the term is used in § 1113(b)(1)(B), which ought to have been disclosed to the Union representative."²³⁴

On the other hand, the courts in *Allied Delivery* and *Salt Creek Freightways* interpreted these provisions narrowly. In *Allied Delivery*, when the debtor made its proposal, it gave the union its most current financial statement, but refused to furnish the union with copies of its financial statements for the three-year period prior to its bankruptcy filing. Although the court did not say a debtor would never be required to furnish such information, the court held that the union had not shown why the previous financial statements were necessary to evaluate the proposal:

The statutory requirement is that the information provided be such "relevant information as is necessary to evaluate the proposal." The proposal is one for modifications necessary to permit the debtor's reorganization. This Court finds that in the absence of the union's showing of a need for specific information beyond the current financial information provided by the debtor, the debtor has complied with this requirement.²³⁵

231. 50 Bankr. 460, 467 (Bankr. N.D. Ind. 1985).

232. *Id.*

233. 49 Bankr. 202 (Bankr. N.D.N.Y. 1985).

234. *Id.* at 207.

235. 49 Bankr. 700, 703 (Bankr. N.D. Ohio 1985). It appears the court may have allocated the burden of proof on the disclosure requirement improperly. Generally, the courts have agreed that the burden of proof in regard to rejection is on the debtor. *In re Bildisco*, 682 F.2d 72, 79 (3d Cir. 1982) ("The burden of persuading the bankruptcy court to permit rejection of a collective bargaining agreement must be placed on the moving party: the debtor-in-possession or the trustee."). In *In re American Provision Co.*, 44 Bankr. 907 (Bankr. D. Minn. 1984), the court broke the statute down into nine requirements. See *supra* note 186. The court found that the burden of persuasion by a preponderance of the evidence lies with the debtor on all nine requirements of § 1113. The court recognized, however, that in regard to item five, on providing relevant information to the union, once the debtor has carried its burden of showing what information it has provided, "[i]t is then incumbent upon the union to produce evidence that the information provided was not the relevant information which was necessary for it to evaluate the proposal." *Id.* at 909-10 (emphasis added). In *Allied Delivery*, on the other hand, the court seems to have reversed the burden of persuasion and the burden of production: "[O]nce the debtor has produced evidence that it provided information to the union, the burden is on the union to

Similarly, in *Salt Creek Freightways*, the court interpreted the disclosure provisions in a relatively narrow fashion, limiting the required disclosure to the debtor's initial disclosure at the time of making its original proposal. The court refused to broaden the requirement at the union's request to include a duty to disclose company information relevant to evaluating the union's counterproposals. The debtor had conveyed its cost estimates of the union's counteroffer orally during negotiations, and the court found the debtor was not required to provide the union with the written materials it had prepared on these cost estimates.²³⁶

Such narrow interpretations of the disclosure requirements are not consistent with the purpose of section 1113. If the courts are truly interested in supporting Congress' goal of encouraging negotiations and the settlement of contract modification disputes prior to rejection, the disclosure requirements should be interpreted as broadly as possible, with use made of protective orders under section 1113(d)(3) if there is any real threat to the competitive interests of the debtor. First, there is no hint in either *Allied Delivery* or *Salt Creek Freightways* of the reason the debtor was unwilling to furnish the requested information. It would have involved no burden for the debtor to compile or produce the information because the materials requested were already in written form, having been prepared for the company's own use. Without any additional facts, the refusal of the debtor to disclose readily accessible information on its past, present, or future financial condition seems like a deliberate ploy to antagonize the union over a fairly petty issue.

Second, and more important, the NLRA's duty to bargain in good faith as interpreted by the courts includes a very broad disclosure requirement. As explained by the Supreme Court: "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. . . . If . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy."²³⁷ This duty to furnish information to support claims made or positions taken at the bargaining table has evolved into a general rule that whenever information is relevant to a mandatory subject of bargaining, the party with the information is obliged to provide it to the other side upon request.²³⁸ The courts and the NLRB have given relevancy a very broad definition, likening it to the

demonstrate that that information was not sufficient, for whatever reason." 49 Bankr. 700, 703 (Bankr. N.D. Ohio 1985) (emphasis added). The court concludes that the union made no showing of why the financial information for previous years was necessary to evaluate the proposal. *Id.*

236. 47 Bankr. 835, 839 (Bankr. D. Wyo. 1985).

237. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956).

238. Although both management and the union have a duty to disclose relevant information, most of the relevant data is in the hands of the employer, with the majority of litigation involving union requests for employer information. See generally *Morris*, *supra* note 23, at 606-29.

Originally, a union had to demonstrate that requested information was relevant and necessary to its duty to bargain intelligently over specific issues raised in negotiations. See, e.g., *Aluminum Ore Co.*, 39 N.L.R.B. 1286, *enforced*, 131 F.2d 485 (7th Cir. 1942). Noting that some types of information were nearly always found to be relevant and necessary, the NLRB eventually adopted a rule of presumptive relevance for wage data and information directly related to it. *Boston-Herald Traveler Corp. v. NLRB*, 223 F.2d 58 (1st Cir. 1955). Slowly, the NLRB began to extend the presumption of relevance to information directly related to all mandatory subjects—a presumption which has been endorsed by the courts. See *White Farm Equip. Co.*, 101 L.R.R.M. 1470 (1979), *enforced*, 650 F.2d 334 (D.C. Cir. 1980); *San Diego Newspaper Guild Local No. 95 v. NLRB*, 548 F.2d 863 (9th Cir. 1977); *Teleprompter Corp. v. NLRB*, 570 F.2d 4 (1st Cir. 1977); *Equitable Life Assurance Soc'y*, 266 N.L.R.B. No. 135 (1983).

liberal definition of relevancy as used in determining the scope of pretrial discovery under the federal rules of procedure.²³⁹

Moreover, to bargain in good faith, an employer is obligated to make even broader disclosures when the employer makes a claim at the bargaining table that it lacks the ability to pay the wages and benefits demanded by the union. Once an employer claims inability to pay, as opposed to an unwillingness to pay, the scope of the employer's duty to furnish information becomes significantly wider: the employer must open up its financial records to the union for independent verification and substantiation of its allegedly poor financial condition.²⁴⁰ Any negotiation of contract modifications in the bankruptcy context necessarily involves a claim on the company's part that it is unable to pay what the contract requires, let alone pay any wage increases.

Consequently, under the provisions of section 1113, it makes little sense to limit the kinds of information the union may obtain from the debtor if, under the duty to bargain in good faith, the union is entitled to even greater disclosure by the company. The word "relevant" as used in section 1113(b)(1)(B) should be construed consistently with the same term as used and understood in the disclosure component of the NLRA's duty to bargain in good faith. Disclosure of the requested information should have been ordered in both *Allied Delivery* and *Salt Creek Freightways* as part of the debtor's obligation to bargain in good faith over the proposed modifications. To give meaning to both the good faith bargaining obligation of section 1113 and the disclosure requirements, these provisions—obligating the debtor to both utilize and

239. In *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967), the Court described the disclosure standard as requiring "the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Id.* at 437. The Court went on to describe this as a "discovery-type standard," quoting Moore's Federal Practice to the effect that discovery during the pre-trial phase is governed by a more liberal standard of "relevance" because the issues in dispute are not as well defined. *Id.* at 437 & n.6. See also *NLRB v. Yawman & Erbe Mfg. Co.*, 187 F.2d 947, 949 (2d Cir. 1951) (disclosure rule in accord with the prevailing discovery practice under "modern codes"); MORRIS, *supra* note 23, at 612-13.

240. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). In *Truitt*, the union requested a wage increase of 10 cents an hour; the company responded that an increase of more than 2 1/2 cents an hour would put it out of business. The union asked for substantiation of this claim and that a CPA be allowed to examine the company's books. When this was denied, the union requested "full and complete information with respect to [the company's] financial standing and profits." *Id.* at 150. This was also refused. The NLRB found that this refusal to provide the requested information was an unfair labor practice and ordered the company to give the union information that would "substantiate the Respondent's position of its economic inability to pay the requested wage increase." *Id.* at 151. The Fourth Circuit denied enforcement of the Board order. 224 F.2d 869 (4th Cir. 1955), *denying enforcement to* 110 N.L.R.B. 856 (1954).

The Supreme Court reversed, holding that "a refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith." *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956). The Court dealt with the company's objection that "the Board's order might be unduly burdensome or injurious to its business" by noting that the Board's policy had consistently been that the information may be "made available in a manner not so burdensome or time-consuming as to impede the process of bargaining." *Id.* at 151 (quoting *Old Line Life Ins. Co.*, 96 N.L.R.B. 499, 503 (1951) and *Cincinnati Steel Castings Co.*, 86 N.L.R.B. 592, 593 (1949)).

This duty to disclose information has been further developed in *Metlox Mfg. Co.*, 153 N.L.R.B. 1388 (1965), *enforced*, 378 F.2d 728 (9th Cir. 1967), *cert. denied*, 389 U.S. 1037 (1968). The Ninth Circuit upheld the Board's determination that, when the employer claimed inability to grant a wage increase and supplied the union only with a three-year old profit and loss statement, the employer had violated the duty to bargain by not supplying enough information. The Board found that the profit and loss statements did not furnish the union with enough information to evaluate the employer's claim. *Id.* at 1396. This duty of disclosure under the NLRA is consistent with the court's suggestion in *K & B Mounting* that the union be supplied with detailed projections and recommendations by an independent management consultant. See *supra* text accompanying note 232.

furnish complete, reliable, and relevant information—should be interpreted in a manner consistent with the disclosure requirements of the NLRA.²⁴¹

If the employer has legitimate concerns about the damages any disclosure of such information could have on its competitive position in its business, then the court may enter a protective order under section 1113(d)(3) in order to prevent any disclosure by the union to third parties. This form of protection has proved satisfactory in the labor law context and orders have been issued under the NLRA to protect sensitive company information such as confidential employee data.²⁴² For example, as unions have become more concerned about the exposure of their members to toxic substances at work, they have been requesting data on substances used in manufacturing. The NLRB and the courts have found that the requested information is relevant, but they have ordered the parties to bargain over the form of disclosure and over restrictions on the union's use of the information.²⁴³ Similarly, under section 1113, the courts can require that disclosure be made to the union, but they are free to restrict both the manner in which the disclosure is made and any subsequent use of the information by the union, in order to protect the competitive interests of the company.

Again, the difficulty with the disclosure requirement in section 1113 is the lack of any practical way to deal with a debtor's failure to disclose all relevant information short of the court's denial or refusal to consider rejection. This sanction is too severe, making it difficult for courts to require greater disclosure unless they are inclined to deny rejection anyway. Under the NLRA, if the Board determines that additional disclosure in bargaining is required, it will order the disclosure to be made and order a resumption of good faith bargaining. Perhaps the bankruptcy courts could continue the rejection hearing for a limited period of time, order additional disclosure, and then give the parties time for additional bargaining before reconvening the hearing. This would have to be accomplished, however, within the thirty-day limit for the court's ruling on rejection set by section 1113(d)(2). Otherwise, the debtor would be rewarded by the delay in that it could temporarily terminate the contract unilaterally pending the court's ultimate ruling on rejection.

3. *The Definition of the Duty to Bargain*

It is the imposition of a duty to bargain, prior to rejection, that forms the heart of the 1984 bankruptcy compromise on collective bargaining agreements. After requiring the debtor to make a fair and equitable proposal limited to necessary modifications, section 1113(b)(2) directs the trustee or debtor to "meet at reasonable

241. See the suggestion of Senator Thurmond that the disclosure requirement be interpreted as consistent with existing law, *supra* note 227.

242. See *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979) (disclosure of employee psychological aptitude test scores conditioned on obtaining each employee's written consent).

243. In a single decision, the D.C. Circuit enforced three orders of the NLRB finding health and safety information requested by the unions relevant because it had "a bearing on the bargaining process." *Oil, Chem. & Atomic Workers v. NLRB*, 711 F.2d 348, 359-61 & nn.25-30 (D.C. Cir. 1983). Because of the employers' legitimate concerns over protecting their trade secrets, as well as confidential employee medical information, however, blanket disclosure was not required, but the parties were ordered to bargain over the extent and conditions of the disclosure to be made. *Id.* at 361.

times” and “confer in good faith” in an attempt to reach “mutually satisfactory” modifications of the collective bargaining agreement.²⁴⁴ The two phrases, “meet at reasonable times” and “confer in good faith,” are taken directly from the definition of the duty to bargain in good faith under the NLRA, as set out in section 8(d).²⁴⁵ The brief legislative history indicates that, in adopting this language, Congress intended to place upon the parties a duty to bargain in good faith as defined by labor law principles.²⁴⁶ Consequently, precedent under section 8(d) interpreting the words “meet at reasonable times and confer in good faith” will be helpful in interpreting and applying the same words as used in section 1113(b)(2).²⁴⁷ Congress’ hope in passing section 1113 was that, by requiring bargaining before rejection, more debtors and unions would reach agreement on necessary modifications to their collective bargaining agreements so that court-ordered rejection would not be necessary.²⁴⁸

The duty to bargain in good faith continues until the parties are at impasse.²⁴⁹ Given the bankruptcy context and the premium on a quick determination of the

244. 11 U.S.C.A. § 1113(b)(2) (West Supp. 1985).

245. N.L.R.A. § 8(d); 29 U.S.C. § 158(d) (1982). See text of § 8(d), *supra* note 48.

246. Senator Moynihan described § 1113(b) as follows:

The conference agreement also provides that a company must meet with its employee representatives in good faith, to reach an agreement concerning the labor contract modifications. *This provision, then, embodies the basic principles of collective bargaining established by Congress in the National Labor Relations Act.* Section 8(a)(5) of the National Labor Relations Act makes it a violation of the Nation’s labor laws to refuse to collectively bargain with the representative of employees

. . . [t]his conference report, consistent with the intent of Congress in the National Labor Relations Act, provides that the company must try to negotiate with employees to work out the changes necessary to prevent the company from failing.

130 CONG. REC. S8900 (daily ed. June 29, 1984) (remarks of Sen. Moynihan) (emphasis added).

Gibson makes the argument that the bargaining procedure was devised by Congress to follow the “reasonable efforts” requirement of *Bildisco*, not the good faith bargaining requirements of the NLRA. Gibson, *supra* note 190, at 329–30. The bankruptcy court in *Wheeling-Pittsburgh Steel*, relying on Gibson’s article, stated that “Congress apparently did not intend bankruptcy courts to interpret the ‘good faith’ element of § 1113(b)(2) in compliance with labor law precedent.” *In re Wheeling-Pittsburgh Steel Corp.*, 119 L.R.R.M. (BNA) 3277, 3281 (Bankr. W.D. Pa. 1985). The court then quotes Senator Hatch’s remarks that the § 1113 bargaining requirement preserves the spirit of *Bildisco*, concluding that the good faith element of § 1113(b)(2) can be satisfied by the reasonable efforts imposed on the debtor by *Bildisco*. *Id.* at 3282. The district court accepted this conclusion without discussion. *In re Wheeling-Pittsburgh Steel Corp.*, 120 L.R.R.M. (BNA) 2198, 2204 (W.D. Pa. 1985). The language of § 1113, however, makes it clear that Congress did not enact *Bildisco* and has required more than reasonable efforts. See *infra* notes 252–54 and accompanying text.

247. For a discussion of good faith bargaining under § 8(d)’s definition, see *supra* notes 19–29 and accompanying text.

248. In describing § 1113, Senator Packwood commented:

On balance, I think the bill should stimulate collective bargaining and limit the number of cases when a judge will have to authorize the rejection of a labor contract

After the proposal is made, and until a hearing on the motion to reject, the parties must bargain in good faith. This provision places the primary focus on the private collective bargaining process and not in courts.

130 CONG. REC. S8898 (daily ed. June 29, 1984). Senator Kennedy agreed, stating that the purposes of § 1113 are “to overturn the *Bildisco* decision which had given the trustee all but unlimited discretionary power to repudiate labor contracts and to substitute a rule of law that encourages the parties to solve their mutual problems through the collective bargaining process.” *Id.* In the House, Rep. Morrison described § 1113 as follows:

The compromise that has been achieved is one that favors procedures which allow for negotiations between the debtor and the labor union for the resolution of these problems when they arise.

The language agreed to by the conferees moves us in the direction of a negotiation process rather than a litigation process to save companies that are in trouble without permitting any abuse of chapter 11 to vitiate improperly [sic] labor contracts.

Id. at H7495.

249. See *supra* notes 24–25 and accompanying text.

contract issues, impasse may be reached very quickly. Senator Packwood described the process of bargaining he envisioned in the following terms:

So the amendment I have offered, expressed in lay language, does the following: Assume, first, that you file bankruptcy

Second, you then go to the union. . . . You say, "We're paying you \$10 an hour and we'll go bankrupt. We want to lower the wages to \$8 an hour."

The union says: "No; we can't go below \$9.25. We won't do that."

You bargain, and you come to an impasse. The employer says, "I can't do it." The union says, "We can't afford to accept that." You are at an impasse.

That does not take very long in collective bargaining. . . . If you are bargaining every day, you can reach an impasse quite quickly. Under my amendment, it is to the employer's interest to bargain every day. If an impasse is going to be reached, the employer can reach it as soon as possible; and you then go to the bankruptcy court and say: "I have bargained with the union in good faith, and we have reached an impasse; we cannot agree. I ask you for the right to discharge the contract."

The court will give its approval if—and here is the key—it finds that the union was unjustified in rejecting the offer and if the balance of equities clearly favors rejection of the contract.²⁵⁰

As Senator Packwood has illustrated, how quickly impasse is reached depends on the circumstances. In emergency situations, or whenever time is an important factor, impasse may be reached very quickly with few meetings.²⁵¹

In *Bildisco*, the Supreme Court held that the parties were required to make reasonable efforts to negotiate a voluntary modification of the contract.²⁵² The Court refused to impose the NLRA duty to bargain in good faith, specifically the duty to bargain to impasse, because the Court felt any finding of impasse would be outside a bankruptcy court's expertise.²⁵³ By using the NLRA's definition of the duty to bargain, however, and imposing this duty on the debtor in section 1113, Congress has expanded the role of the bankruptcy courts in supervising the behavior of both the employer and union after a bankruptcy petition has been filed. In effect, the bankruptcy courts are being called upon to develop whatever expertise is necessary to decide whether the parties have, as required by the statute, met at reasonable times and conferred in good faith.²⁵⁴

250. 130 CONG. REC. S6182 (daily ed. May 22, 1984). Although Senator Packwood was describing the process under his earlier amendment, § 1113(b)(2) of the Packwood Amendment was adopted verbatim as § 1113(b)(2) in the final legislation. See the Packwood Amendment printed at 130 CONG. REC. S6182-82 (daily ed. May 22, 1984).

251. See, e.g., *Lou Stecher's Super Mkts.*, 275 N.L.R.B. No. 71, 119 L.R.R.M. (BNA) 1129 (May 21, 1985) (impasse reached after three meetings); *Bell Transit Co.*, 271 N.L.R.B. 1272, 117 L.R.R.M. (BNA) 1113 (1984) (three meetings); *Dalton Brick & Tile Corp.*, 126 N.L.R.B. 473 (1960) (two meetings), *enforcement denied on other grounds*, 301 F.2d 886 (5th Cir. 1962); *Wells Dairies Co-op*, 111 N.L.R.B. 1192 (1955) (three meetings); *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214 (1951) (impasse may have been reached at second meeting).

252. 465 U.S. 513, 526 (1984).

253. *Id.* at 533-34.

254. Because this duty to bargain in good faith under § 1113 is a part of the bankruptcy proceedings, it will be the bankruptcy courts, not the NLRB, who will be making these determinations.

The NLRB will have no jurisdiction to enforce this duty to bargain. Congress amended the Bankruptcy Code, not the NLRA, and specifically mandated that the bankruptcy court find that the parties have met at reasonable times and conferred in good faith before ruling on or granting a debtor's rejection application. It was clearly Congress' intent to keep these issues in the bankruptcy court, or in the federal district court, if either party seeks transfer under 28 U.S.C.A. § 157(d) (West Supp. 1985). See *infra* note 256.

Congress did not amend the NLRA when it amended the Bankruptcy Code. Under § 8(d) of the NLRA, there is no

A determination that the parties have bargained in good faith is not a particularly esoteric matter requiring substantial labor law experience, but is an imprecise generalization based on the fact finder's common sense and good judgment. It is a legal conclusion reached after examining all the factual circumstances involved in each case.²⁵⁵ A bankruptcy court, ultimately charged with balancing all the equities, in order to determine whether or not rejection should be granted if negotiations fail, will have adequate information to determine whether or not the parties have bargained in good faith. Furthermore, it will be in an adequate position to judge whether or not additional negotiations would be futile: a finding of impasse.²⁵⁶

If the question of the meaning of the duty to bargain in good faith under section 1113 reaches the Supreme Court, the Court should give recognition to the fact that Congress did *not* enact the accommodation between labor law and the Bankruptcy Code which the Court devised in *Bildisco*. Given the fact that in section 1113 Congress adopted the NLRA language defining the duty to bargain, which includes the impasse obligation, the Court should be willing to modify its position and require that bargaining continue until either the parties reach impasse or the rejection hearing occurs.

Imposing an obligation to bargain in good faith as developed under the NLRA will not thwart the bankruptcy goal of successful reorganization of the business. Bargaining to impasse does not necessarily take any more time than making reasonable efforts, but it implies a seriousness and requires a more determined effort on the part of each party to make accommodations in order to reach agreement on mutually satisfactory modifications. It recognizes that the union must be taken into account by the employer and given the opportunity to participate in the process of restructuring the business. The union and the employees it represents will be more willing to cooperate throughout the reorganization period if they realize the employer understands its bargaining obligations and is sincere in attempting to negotiate a compromise, instead of imposing a predetermined result on the employees. The impression the labor community had received from the numerous pre-*Bildisco*

duty on either party to bargain over modifications in a contract during its term. One must bargain over modifications only upon notice given 60 days prior to the termination date contained in the contract. *See supra* note 49.

255. Because the concept of good faith is so elusive and so fact sensitive, the possible fact patterns and cases discussing good faith bargaining are endless. For a summary of good faith bargaining determinations, *see Morris, supra* note 23, at 570-606.

256. If the parties do not have confidence in the bankruptcy judge's expertise to make determinations regarding good faith bargaining or impasse, either party may request that the rejection issues under § 1113 be referred to the district court judge for decision. Under § 157(d), the district judge may withdraw any core bankruptcy proceeding from the bankruptcy court on the motion of any party for cause shown. The statute continues:

The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C.A. § 157(d) (West Supp. 1985). This provision was added as a part of the 1984 Amendments. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 341. In discussing § 1113, Rep. Morrison pointed out that because rejection of collective bargaining agreements implicates national labor policy, "if the union or trustee so move, such an application is to be heard by a U.S. district judge." 130 CONG. REC. H7496 (daily ed. June 29, 1984).

A finding of impasse takes on added importance if it is required before a debtor may make any immediate changes in working conditions in the event the bankruptcy or district court grants the rejection application. *See infra* notes 364-82 and accompanying text.

rejection cases, and from the Court's elevation of bankruptcy concerns over labor obligations in *Bildisco*, was that the bankruptcy courts would not take the Supreme Court's requirement of reasonable efforts very seriously. Congress has emphasized the importance of the bargaining obligation imposed under section 1113 by ignoring the Court's concept of reasonable efforts and by adopting the NLRA bargaining language instead.

On the other hand, one of the difficulties of enforcing the section 1113 duty to bargain is that the sanction for a debtor's failure to bargain in good faith may be too severe. If the bankruptcy court finds the debtor has not bargained in good faith, the court must refuse to consider or must deny the employer's rejection application.²⁵⁷ A bankruptcy court may be of the opinion that the debtor has not engaged in any meaningful give and take with the union, but that the debtor still needs relief from the collective bargaining agreement. Because the court cannot order the parties to agree to any specific modifications, and because the court may not order only partial rejection of the contract, the court is faced with an all or nothing choice: either keep the contract in effect, or reject it in its entirety. There should be a way for the bankruptcy court to mandate further and more serious negotiations while holding the rejection application in abeyance. If the employer has not bargained in good faith by the time of the rejection hearing, or if the parties have not yet reached impasse, the court could continue the hearing for another two or three weeks, giving the parties another chance to reach agreement. If no agreement has been reached by thirty days after the initial hearing date, then, but only then, is the court required to rule on the rejection application.²⁵⁸ Every effort should be made to assist the parties in negotiating a modified contract. Reaching an agreement will not only avoid rejection, but will also serve the goal of successful reorganization. The debtor's financial situation will be stabilized, and the parties will not have to spend time negotiating an entirely new contract. Furthermore, a negotiated compromise will insure that no strike will occur upon rejection.

Although the duty to bargain under section 1113 is defined in NLRA terms, the bargaining process is structured in a very different way. Under section 1113, the parties are directed to bargain over only a single proposal, the debtor's proposal under section 1113(b) containing only those modifications deemed necessary to permit reorganization. Several questions arise as to how this good faith bargaining requirement should be interpreted. Is bargaining limited to the debtor's initial proposal, or may the union respond with a counteroffer? Is the debtor required to bargain over any counteroffer?

The strangest aspect of section 1113's bargaining process is the lack of any provision for the union to make a counterproposal in response to the debtor's required proposal. There is no explicit provision for the exchange of offers and counteroffers,

257. A finding of good faith bargaining by the debtor is required indirectly in § 1113(c). In order to rule on rejection the court must find that the union refused to accept the debtor's proposal without good cause. If the debtor has not bargained in good faith, then the union has good cause to refuse to agree. See *infra* notes 273-74 and accompanying text.

258. 11 U.S.C.A. § 1113(d)(2) (West Supp. 1985).

the usual process of negotiation.²⁵⁹ The statute is phrased in terms of the debtor making a proposal, which the union may not reject unless it has good cause to do so. At first blush, the language seems to call for only one "take it or leave it" offer from the company, a clear violation of the duty to bargain in good faith under the NLRA.²⁶⁰ The Congressional language, however, then calls for the debtor to "confer in good faith" in order to reach "mutually satisfactory modifications" of the agreement. How can mutual satisfaction be achieved if the union is not allowed to make any suggestions or any counter offer which the debtor, in turn, is required to consider seriously? What is there to confer about if the company makes only one proposal and refuses to amend it in responses to union proposals? The entire concept of bargaining is meaningless if the union is not allowed to present its own proposals and if the employer is not required to give them the same serious consideration which the union must give the employer's. The only way this procedure will be successful in achieving Congress' goal of encouraging negotiated settlements is for the bankruptcy courts to interpret this bargaining requirement to include a duty on both sides to bargain over both parties' offers and counteroffers.

The most helpful comment in the legislative history is Senator Thurmond's suggestion that the courts interpret this bargaining procedure "in the most practical and workable manner possible."²⁶¹ With that admonition in mind, it would be preferable for the courts to encourage the union to make a counterproposal which includes those modifications that the union considers necessary to the debtor's reorganization. If the employer rejects the union's counteroffer and does not make a second offer in response, at a minimum, the employer should be required to explain why the union's offer is not adequate to achieve a successful rehabilitation of the business. If the employer refuses to bargain over the union's counteroffer, the bankruptcy court in its discretion may find that the company's proposal did not meet the requirements of section 1113(b)(1)(A) because it contained unnecessary modifications, or that the union had good cause under section 1113(c) to refuse to accept the proposal.

259. This is in contrast to the provision of H.R. 5174 as passed by the House in March 1984. The House version provided in § 1113(d)(2) that a motion for rejection could be filed if:

(A) the trustee has proposed modifications in such agreement to such authorized representative deemed necessary by the trustee for successful financial reorganization of the debtor and preservation of the jobs covered by such agreement;

(B) the trustee has considered but rejected as inadequate for successful financial reorganization of the debtor and preservation of the jobs covered by such agreement *alternative proposals for modifying such agreement made by such authorized representatives*; . . .

130 CONG. REC. H1842 (daily ed. March 21, 1984) (emphasis added).

260. See *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 485 (1960) ("Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it.'"); *NLRB v. General Elec. Co.*, 418 F.2d 736, 746 (2d Cir. 1969), cert. denied, 397 U.S. 965 (1970) (notifying union of unilateral wage increase to be instituted, unless union objects, constitutes refusal to bargain); *Federal Mogul Corp.*, 212 N.L.R.B. 950, 965 (1974), enforced, 524 F.2d 37 (6th Cir. 1975) ("take it or leave it" offer that expired in five days shows refusal to bargain).

261. 130 CONG. REC. S8888 (daily ed. June 29, 1984) (remarks of Sen. Thurmond).

In the few early cases decided under section 1113, the courts have been willing to deny rejection in order to enforce the duty to bargain and require the parties to engage in some give and take. In *In re American Provision Co.*, the bankruptcy court found the debtor did not confer in good faith.²⁶² Only one meeting was held, at which the debtor made its required proposal. The union rejected this proposal, but indicated a willingness to discuss the issues further; the debtor made no further response. The court concluded the debtor's attempts to confer "were perfunctory only and meant only to literally meet the requirements of the statute."²⁶³ Similarly, in *Fiber Glass Industries*, the court denied rejection in part because the debtor refused to consider any of the union's counteroffers, holding firm to its initial demand.²⁶⁴ In contrast, the debtor in *Allied Delivery System* reduced the demands contained in its initial proposal in response to a counteroffer from the union and submitted a second revised proposal. The court found that both the original and the subsequent proposal of the debtor met the requirements of section 1113(b).²⁶⁵ Because the debtor reduced its demand during the period of negotiations between the date of its original offer and the date of the rejection hearing, the court found the debtor had engaged in good faith bargaining and the union had rejected the second proposal without good cause, a prerequisite to the court's approval of rejection.²⁶⁶

If the parties have bargained over possible contract modifications prior to the debtor's bankruptcy filing, these prepetition negotiations should be taken into account in making a determination of good faith bargaining. Any such prior history of negotiations will also have an impact on whether counteroffers and responses should be required after the debtor's section 1113(b) proposal has been made. The long and extensive history of negotiations, concessions, and contract modifications between Wheeling-Pittsburgh Steel Corporation and the United Steelworkers give a unique tone to the court's approval of the company's rejection petition in *In re Wheeling-Pittsburgh Steel Corp.* The company's section 1113(b) proposal, delivered in May 1985, shortly after it filed bankruptcy, functioned as a final offer delivered at the end of a long period of negotiations and concessions which began in 1982.²⁶⁷ During May

262. 44 Bankr. 907, 910 (Bankr. D. Minn. 1984).

263. *Id.* at 911.

264. 49 Bankr. 202, 206-07 (Bankr. N.D.N.Y. 1985).

265. 49 Bankr. 700, 702-04 (Bankr. N.D. Ohio 1985). In fact, the court felt constrained to construe the term "necessary" in § 1113(b) as a broader term, less stringent than the "essential" used in § 1113(e), in order to give the debtor room to respond to the union and revise its original proposal. The court was of the opinion that if "necessary" was construed too narrowly, it would render the requirement of good faith negotiations meaningless, "since the debtor would thereby be subject to a finding that any substantial lessening of the demands made in the original proposal proves that the original proposal's modifications were not 'necessary.'" *Id.* at 702. Consequently, the court found both proposals of the debtor in compliance with § 1113: the original proposal, which must be made *before* the debtor files for rejection, complied with § 1113(b)(1)(A); the second revised proposal complied with § 1113(c)(1), incorporating the requirement of § 1113(b)(1) that a proposal contain only necessary modifications. *Id.* at 703-04.

266. *Id.* at 704. The facts of *In re Salt Creek Freightways*, 47 Bankr. 835 (Bankr. D. Wyo. 1985), are similar to *Allied Delivery* in that the union submitted counterproposals which the debtor analyzed and for which it prepared cost estimates. In response, the debtor also modified its proposal on insurance, requested the participation of a federal mediator at the last of four negotiating sessions, and submitted a "Last Best Offer" to the union prior to the court's ruling approving rejection. *Id.* at 839. These facts were more than sufficient to establish that the debtor had bargained in good faith.

In *K & B Mounting*, on the other hand, the court found the debtor had not engaged in good faith bargaining because the debtor had never met with the union. 50 Bankr. 460, 468 (Bankr. N.D. Ind. 1985).

267. 119 L.R.M. (BNA) 3277, 3279-80 (Bankr. W.D. Pa. 1985). In December 1982, Wheeling-Pittsburgh and

and June 1985, the union apparently accepted six of the company's eight proposed modifications, refusing to agree to only two items.²⁶⁸ The union, however, made no counteroffers during this bankruptcy negotiation period and the company never deviated from its initial section 1113(b) proposal. Presumably, all previous bargaining offers and counteroffers had been considered and refused by both parties prior to the company's formulation of its section 1113(b) proposal as its final offer before seeking rejection.

Assuming that the exchange of offers and counteroffers is the preferable approach under section 1113, the parties have a limited time period within which this duty to bargain in good faith must be fulfilled. The statute requires that the parties meet at reasonable times "[d]uring the period beginning on the date of the making of [the debtor's] proposal . . . and ending on the date of the [rejection] hearing."²⁶⁹ Because the statute requires a rejection hearing to be held within fourteen to twenty-one days after the debtor's rejection application is filed,²⁷⁰ the debtor's filing of its rejection application determines the limits of the time period during which bargaining must take place. The bankruptcy context gives these negotiations an urgency they otherwise might not have. The need for speed, however, does not mean the bargaining may be superficial or in bad faith. These time limits provide the framework within which significant movement by both parties may take place if they are serious about seeking agreement. If the parties bargain in good faith and reach agreement on mutually satisfactory modifications, any application for rejection becomes moot.²⁷¹ The contract is modified per agreement and remains in effect until

the Steelworkers Union negotiated a new contract which immediately cut labor costs from \$25 per hour to \$18.60 per hour, and provided for periodic increases which would restore wage costs to \$25 per hour by the time the agreement expired on July 31, 1986. In November 1984, Wheeling-Pittsburgh asked the union to cancel the remaining restorations provided for in the 1982 contract; the union agreed to defer the remaining restorations indefinitely. *Id.* On January 15, 1985, Wheeling-Pittsburgh again asked the union for another concession. The union agreed to consider further concessions, but only if Wheeling-Pittsburgh's lenders would also grant the company financial concessions. Negotiations between the company, its lenders, and the union eventually reached a stalemate in April 1985, and the company filed its Chapter 11 bankruptcy petition. After submitting its § 1113(b) proposal to the union on May 9, 1985, the company filed its application for rejection of the collective bargaining agreement on May 31, 1985. *Id.* at 3280.

268. The two issues still in dispute at the time of the rejection hearing in June 1985, were (1) the company's average labor cost offer of \$15.20 per hour, which included an hourly wage rate plus all fringe benefit costs and government payroll taxes; and (2) the company's proposal that the contract with this wage rate be extended for a five-year term. *Id.* at 3282. At the time the company filed its bankruptcy petition, the average labor cost was \$21.40 per hour. *Id.* at 3280. Without the proposed five-year extension, the contract would expire on July 31, 1986.

269. 11 U.S.C.A. § 1113(b)(2) (West Supp. 1985).

270. 11 U.S.C.A. § 1113(d)(1) (West Supp. 1985).

271. Senator Moynihan commented that "if the union and the company cannot reach agreement, the bankruptcy court may authorize the cancellation of the union contract" as long as § 1113's requirements are met. 130 CONG. REC. S8900 (daily ed. June 29, 1984). Rep. Lungren, in explaining § 1113's provisions, stated that for the bankruptcy court to consider the rejection question, "the authorized representatives of the employees would have had to refuse to accept such proposal without good cause. Only at that point would the court move to allow abrogation of the contract." *Id.* at H7495.

The 1984 amendments require good faith bargaining, but make no provision for court approval of any resulting agreement modifying the contract. If mutually satisfactory modifications are made in the collective bargaining agreement, the parties should request court authorization for the debtor to enter into or assume the modified contract. The courts have disagreed on whether a trustee or debtor-in-possession has the authority to enter into a new collective bargaining agreement during bankruptcy without express approval by the bankruptcy court. See *In re Willow Cafeterias*, 111 F.2d 429 (2d Cir. 1940) (under the Bankruptcy Act, trustee may enter into new collective bargaining agreement during reorganization proceedings without court approval, since authority to hire workers is a necessary part of the authority to operate the business); *In re DeLuca Dist. Co.*, 38 Bankr. 588 (Bankr. N.D. Ohio 1984) (same result under the Bankruptcy

it expires by its own terms.

4. The "Without Good Cause" Refusal of the Union to Agree as a Precondition to Rejection

In the event the debtor and the union have bargained in good faith and have been unable to reach agreement on mutually satisfactory modifications of the collective bargaining agreement, the bankruptcy court may proceed to rule on the debtor's rejection application. Section 1113(c) sets forth two preconditions which must be met before the court reaches the "balancing of the equities" stage. The court must find (1) that the debtor has made a proposal which satisfies the requirements of section 1113(b), and (2) that the union has refused to accept the proposal without good cause.²⁷² The first precondition has already been discussed. The second precondition is the final step in the bankruptcy bargaining process.

This final prerequisite to rejection, that the union has refused to agree to the debtor's proposal without good cause, was evidently included by Congress as an indirect way to enforce the duty to bargain in good faith. It is under this subsection of section 1113 that the question of whether the parties have bargained in good faith will be litigated. Senator Packwood describes the phrase as giving the employer greater incentive to bargain in good faith:

The "without good cause" language provides an incentive or pressure on the debtor to negotiate in good faith. In practical terms, this language imposes no barrier to rejection if the debtor's proposal has contained only the specified "necessary" modifications. Thus, the language serves to prohibit any bad faith conduct by an employer, while at the

Code). Cf. *Local Joint Executive Bd. v. Hotel Circle*, 613 F.2d 210 (9th Cir. 1980) (under the Bankruptcy Act, receiver has no authority to adopt a collective bargaining agreement without court approval); *In re Air Florida Sys.*, 48 Bankr. 440 (Bankr. S.D. Fla. 1985) (court approval needed for interim collective bargaining agreement to be effective). In order to protect the employer from possible further litigation and to protect the union's and employees' rights under the modified contract, a wise debtor or union should seek bankruptcy court approval of the modified contract.

Under § 365, a debtor-in-possession may not assume an executory contract without court authorization. 11 U.S.C. § 365(a) (1982). This provision only applies to executory contracts in existence when the bankruptcy petition was filed, not to contracts entered into by the debtor-in-possession after bankruptcy has been filed. A debtor-in-possession may enter into a new contract during bankruptcy without court authorization if the contract is part of the ordinary course of business. See 11 U.S.C. §§ 1107 and 1108 (1982); *In re James Phillips, Inc.*, 29 Bankr. 391 (S.D.N.Y. 1983). If not a part of the ordinary course of business, the debtor must get court approval.

In this situation, any agreement between the debtor and the union would probably be regarded as a modification of a pre-existing executory contract. Consequently, assumption may be required. To assume a contract, however, certain conditions must be met, such as curing any default under the contract. See § 365(b)(1) and *infra* note 356 and accompanying text. If it is not possible for the debtor to meet these assumption requirements, the parties should adopt the modified contract as an entirely new collective bargaining agreement and obtain court authorization of it as a new contract. Court authorization should be sought because the collective bargaining agreement may be regarded as a contract outside the scope of the ordinary course of doing business.

Section 1113 seems to imply that a collective bargaining agreement may be assumed under its provisions. In the first paragraph it states that "[t]he debtor in possession, or the trustee . . . may assume or reject a collective bargaining agreement only in accordance with the provisions of this section." 11 U.S.C.A. § 1113(a) (West Supp. 1985) (emphasis added). There are, however, no further provisions in § 1113 dealing with assumption. Accordingly, we must presume that assumption of the modified contract should occur in conformance with the assumption requirements contained elsewhere in the Code. 11 U.S.C. § 365(a), (b)(1) (1982). Regardless of whether the modified contract is assumed, or whether a new contract containing the modifications is formed, court approval is required. If a rejection application is pending, this could be done at the time the rejection application is dismissed as moot. If no rejection application has yet been filed, a joint request for assumption or court approval should be filed by the debtor and the union.

272. 11 U.S.C.A. § 1113(c) (West Supp. 1985).

same time protecting the employer from a Union's rejection of the proposal without good cause.²⁷³

Senator Packwood views this provision of section 1113(c) as the way to enforce the "meet and confer" requirements of section 1113(b).²⁷⁴ If the court finds the debtor has not bargained in good faith, then the court should find that the union has had good cause not to accept the debtor's proposal. Similarly, if the union has not bargained in good faith, then obviously its refusal to accept the debtor's proposal was without good cause. These conclusions on cause follow naturally from the court's conclusion on the presence or absence of good faith in bargaining.

A more difficult issue of interpretation is presented, however, if both parties have bargained in good faith but have not been able to reach agreement on mutually satisfactory modifications. Where good faith bargaining has occurred, does the "without good cause" prerequisite require any additional findings by the bankruptcy court evaluating the union's substantive position at the bargaining table? On the one hand, does it give the union a chance to avoid rejection by arguing the merits of its position in negotiations? On the other hand, does it require the court to find the union's bargaining position is not justified in order to reach rejection?

If this language is interpreted as requiring the court to evaluate the merits of the parties' bargaining positions, it has no parallel in labor law. In fact, the notion that a party in negotiations must have any reason, let alone a good reason, for rejecting the proposal of the other party is totally at odds with labor law principles. In defining the duty to bargain under the NLRA, section 8(d) explicitly states that the bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession."²⁷⁵ In contrast, this bankruptcy requirement seems to suggest that in order to avoid rejection the union must agree to the debtor's proposal unless it has some undefined good cause to refuse, or in the alternative, that, if the union has this

273. 130 CONG. REC. S8898 (daily ed. June 29, 1984).

274. In an analysis of § 1113 prepared by conference committee members Representatives Hughes and Morrison, they identify the "without good cause" requirement as based on a suggestion by Professor Countryman and Mr. Bordewick contained in their 1983 article: "[R]ejection of a collective bargaining agreement should be permitted only in extraordinary cases, when the union involved has *unjustifiably refused* to agree to modification of the agreement necessary to insure a successful reorganization." Bordewick & Countryman, *supra* note 74, at 299-300, cited in 130 CONG. REC. S8899 (daily ed. June 29, 1984) (emphasis added). After making this suggestion, Countryman and Bordewick continue by arguing that, because court approval of rejection interferes with collective bargaining and labor agreements in violation of national labor law policy, a bankruptcy court should approach any rejection petition "with a strong presumption against approval of the relief sought." *Id.* at 300. Countryman and Bordewick give two examples of when a union would *not* be justified in opposing rejection:

[1.] if it appeared that the union was willing for tactical reasons to sacrifice the particular employees involved and thus did not care whether the debtor in fact was forced into liquidation.

[2.] [if a union was] seeking only to forestall a liquidation by several months (or perhaps years) in order to preserve short-term employment. . . . [A] union seeking to preserve short-term employment benefits is not even acting in the best interests of the employees.

Id. at 319. These are examples of when, in their opinion, a court would be justified in approving rejection over a union's objections. Such unjustified union opposition to rejection, however, has little relationship, if any, to an evaluation of when a union has good cause to refuse to agree to specific proposed contract modifications. Opposing rejection altogether is not the same as refusing to agree with an employer on what contract modifications are necessary for reorganization, or refusing to agree because the union believes the debtor has not bargained in good faith. It is debatable just how helpful these examples are in interpreting the "good cause" language of the statute.

275. 29 U.S.C. § 158(d) (1982).

good cause, the court may not consider rejection.²⁷⁶ If this prerequisite requires or allows the court to evaluate the merits of the union's bargaining stance, this legislation marks a fundamental departure by Congress from the "freedom of contract" principle that is embodied in the NLRA.²⁷⁷

Congress, no doubt, was encouraged to abandon labor law's insistence on freedom of contract by the Supreme Court's approach in *Bildisco*. Until *Bildisco*, the Supreme Court had taken a "hands-off" policy in refusing to interfere with the substance of labor negotiations, denying the NLRB any remedial power to compel a party to agree to any specific contract term, no matter how egregious the party's violations of the NLRA.²⁷⁸ In *Bildisco* itself, the Court recognized that "the national labor policies of avoiding labor strife and encouraging collective bargaining . . . generally require that employers and unions reach their own agreements on terms and conditions of employment free from governmental interference."²⁷⁹ In allowing the debtor to modify a collective bargaining agreement unilaterally, the Court departed from the freedom of contract principle, justifying its result by the exigencies of bankruptcy.²⁸⁰ The Court recognized labor policy only to the extent that it required the employer to make reasonable efforts to negotiate prior to rejection.

Although in section 1113 Congress imposed an actual duty to bargain, instead of only reasonable efforts, it implicitly accepted *Bildisco*'s radical departure from traditional labor law principles. Section 1113 does not leave the parties free to negotiate their own contract terms once it has compelled their presence at the

276. Although the courts seem to agree that the debtor bears the ultimate burden of persuasion on each element that is required before rejection can be approved, they have specified that the union bears the burden of production of evidence on this issue: "[O]nce the debtor has shown that the Union has refused to accept its proposal the Union must produce evidence that it was not without good cause. . . . [O]nce the Union has come forward with evidence on [this element], the ultimate burden of persuasion . . . still lies with the debtor." *In re American Provision Co.*, 44 Bankr. 907, 910 (Bankr. D. Minn. 1984). See also *In re Salt Creek Freightways*, 47 Bankr. 835, 838 (Bankr. D. Wyo. 1985).

277. The fact that the NLRA was based on the principle of freedom of contract has been recognized often by courts and commentators and is reflected in the legislative history of the Act. See, e.g., *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970) ("The object of this Act was . . . to ensure that employers and their employees could work together to establish mutually satisfactory conditions."); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) ("The Act does not compel agreements between employers and employees. It does not compel any agreement whatever."); *United Steelworkers of Am. v. NLRB*, 389 F.2d 295, 300 (D.C. Cir. 1967) ("We recognize that the National Labor Relations Act is grounded on the premise of freedom of contract."); S. REP. NO. 573, 74th Cong., 1st Sess., 12 (1935) ("the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory"); 79 CONG. REC. 7659 (1935) (remarks of Sen. Walsh) ("the bill requires no employer to sign any contract, to make any agreement, to reach any understanding with any employee or group of employees"); Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. PA. L. REV. 467, 467 (1964) ("Among the many competing goals of national labor policy, two have been frequently proclaimed and staunchly defended. . . . One is industrial peace; the other is freedom of contract. . . . Both goals are embedded deeply in the myth and in the reality of national labor policy.").

278. See, e.g., *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (Supreme Court refused to enforce a Board order requiring the employer to agree to a union dues check-off provision in the collective bargaining agreement. The Board had ordered the employer to agree to the clause because it continued to refuse to agree to the check-off clause for over eight years for the sole purpose of avoiding reaching an agreement with the union.).

279. 465 U.S. 513, 526 (1984).

280. *Id.* at 533-34.

bargaining table. It mandates the scope of the proposal the debtor must make and seems to imply that the union must accept it unless it has good cause to refuse.²⁸¹

Because section 1113(c)'s requirement that the union accept the proposed modifications, unless it has good cause to refuse, is such a radical departure from labor policy, no labor law precedent exists to assist in its interpretation. How are the courts to apply this "without good cause" requirement? The brief legislative history gives us few clues and only more confusion.²⁸² Senator Thurmond commented:

The requirement that the union refusal to accept the proposal be "without good cause" is obviously not intended to import traditional labor law concepts into a bankruptcy forum or turn the bankruptcy courts into a version of the National Labor Relations Board. Again, the intent is for these provisions to be interpreted in a workable manner.²⁸³

Obviously, this phrase cannot import labor law concepts into the bankruptcy court, at least not NLRA bargaining concepts, because this language is foreign to the NLRA.²⁸⁴

In the few opinions on rejection under section 1113, the courts have had a difficult time giving any meaning to the "without good cause" requirement. In *Allied Delivery*, the court basically equated the "without good cause" requirement with the previous "necessity" and "fair treatment" requirements of the debtor's proposal: "If the proposal is necessary and is fair and equitable, which this Court finds that it is, then the union's refusal to accept it on the basis that the proposal is unjust, as the union representative has testified, is not for good cause."²⁸⁵ The court had previously held that the parties had bargained in good faith and did not tie the "without good cause" prerequisite to the bargaining obligation.

281. This departure from labor law principles *a la Bildisco* is also exemplified by § 1113's provisions allowing the court to authorize interim changes (*see infra* notes 327-51 and accompanying text) and allowing the employer to terminate the collective bargaining agreement upon the expiration of 30 days after the rejection hearing (*see supra* notes 174-82 and accompanying text).

282. Senator Hatch described the "without good cause" requirement as follows:

[T]he unions must not reject the business offer without good cause. This opportunity to accept or reject the proposal should be assessed in light of the essentiality of swift and fair resolution of the initial phases of reorganization. Accordingly, rejection of a proposal should only happen if the cause for rejection is good enough to risk the damage to the business as well as its creditors and employees that delay or protracted negotiations could produce.

130 CONG. REC. S8892 (daily ed. June 29, 1984). One commentator has remarked that "[t]o the ears of a somewhat jaundiced bankruptcy practitioner, this seems to be a long-winded way of saying that this provision means nothing at all." Gibson, *supra* note 190, at 340-41.

283. 130 CONG. REC. S8888 (daily ed. June 29, 1984).

284. Perhaps Senator Thurmond had in mind the "good cause" language on employee discharges found in both the NLRA and most collective bargaining agreements. Section 10(c) of the NLRA provides, in part:

No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged *for cause*.

29 U.S.C. § 160(c) (1982) (emphasis added). Most collective bargaining agreements contain a provision to the effect that no employee may be discharged without good cause. In fact, many arbitrators will imply a "good cause" limitation on discharge in a collective bargaining agreement even if it does not contain express language to that effect. *See F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS* 611-12 (3d ed. 1973). Thus, in the employment context, good cause is litigated most frequently in the arbitration of individual employee discharges under collective bargaining agreements.

285. 49 Bankr. 700, 704 (Bankr. N.D. Ohio 1985). *Accord, In re Carey Transp.* 50 Bankr. 203, 212 (Bankr. S.D.N.Y. 1985).

In *Salt Creek Freightways*, the court in effect ruled that as long as the parties bargained in good faith, the court could reach rejection, refusing to give any additional significance to the "without good cause" language.²⁸⁶ The court raised the question of whether the "without good cause" requirement required a finding that the union had bargained in bad faith, refusing to give the phrase such a construction, and holding that in order to reach rejection it was not necessary to find that the union's refusal to agree was in bad faith. The failure of the parties to reach agreement on modifications appeared to be "the result of the difficultness of the task, rather than the lack of 'good faith' of either party."²⁸⁷ The union may have a "principled reason" for rejecting the debtor's proposal, which, from a subjective view and in light of the union's self-interest, may be a perfectly good reason. "However," the court continued, "the court must review the union's rejection utilizing an objective standard which narrowly construes the phrase 'without good cause' in light of the main purpose of Chapter 11, namely reorganization of financially distressed businesses."²⁸⁸ The court held that the union's refusal to agree, based on its policy decision to insist on pension benefits and a contract based on the union's national industry-wide contract, was not unreasonable and was in good faith, but did not constitute good cause under section 1113(c)(2).²⁸⁹

By giving a narrow reading to this prerequisite, the court appears to be saying that if the debtor has made a proper proposal under section 1113(b), the parties have both bargained in good faith, and yet have not reached agreement, then the court should be able to rule on rejection.²⁹⁰ Any refusal of the union to accept the debtor's proposal, as long as all the previous requirements have been met, will be without good cause. In this way, the court avoids any substantive evaluation of the merits of the union's bargaining position which the court is in no position to make. At least two bankruptcy courts have explicitly recognized the inappropriateness of the court inserting itself into the substance of the negotiations. In *Fiber Glass Industries*, the court stated that it could not "evaluate the proposal and counterproposals with the aim of formulating a substantive solution to the parties' differences by fixing the terms of the collective bargaining agreement, nor would it be appropriate to do so."²⁹¹

Similarly, in *Wheeling-Pittsburgh Steel*, the bankruptcy court commented:

286. 47 Bankr. 835, 840 (Bankr. D. Wyo. 1985).

287. *Id.*

288. *Id.* at 840.

289. *Id.* at 841.

290. The bankruptcy court in *Wheeling-Pittsburgh Steel* gave a similar construction to the "without good cause" requirement:

Having found that Wheeling-Pittsburgh submitted a proposal which was based on the most complete and reliable information available at the time of its creation, contained only necessary modifications, and treated all affected parties fairly and equitably; and having further found that the Company met at reasonable times with the Union, conferred in good faith, and provided the Union with such relevant information as was necessary to evaluate the proposal, the court is constrained by logic to find that the Union rejected the Company's proposal without good cause.

119 L.R.R.M. (BNA) 3277, 3287 (Bankr. W.D. Pa. 1985).

291. 49 Bankr. 202, 206 (Bankr. N.D.N.Y. 1985).

The parties recognize that this is a collective bargaining dispute and that this court, as a place for resolving a collective bargaining dispute, is not the proper forum. The real decisions must be made at the bargaining table This court cannot compel, but it can and does encourage the parties to continue negotiations to reach a solution, without which the likelihood of liquidation is very real.²⁹²

The courts should not be in the position, even indirectly, of dictating to the parties the terms of their agreement, which they, not the court, are going to have to live with over a relatively long period of time until the contract expires. The most that can be asked of the bankruptcy court is to guarantee that the debtor has made the required proposal and has truly bargained in good faith with the union. If these requirements are met, and the debtor and union have not reached agreement, then the union takes the chance of rejection of the entire contract.

C. The Rejection Standard Adopted by Congress

Assuming all the preconditions have been met and no agreement has been reached on a modified contract, the bankruptcy court is allowed to rule on the debtor's application for rejection of the collective bargaining agreement. Section 1113(c) specifies:

The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

. . .

(3) the balance of the equities clearly favors rejection of such agreement.²⁹³

Now the court must proceed to balance the equities in deciding whether to grant rejection.

1. The Balance of the Equities Must Clearly Favor Rejection

Although Congress adopted the *Bildisco* "balancing of the equities" standard, the Congressional language is stronger than that used by the Supreme Court. Rejection may be approved only when the "balance of the equities *clearly* favors rejection." The addition of the word "clearly" seems to call for more evidence or a slightly higher burden of proof in support of rejection.²⁹⁴ Senator Hatch, a member of the conference committee, commented:

292. 119 L.R.R.M. (BNA) 3277, 3288 (Bankr. W.D. Pa. 1985). In affirming the bankruptcy court, the district court quoted this language and added its own comment:

If a way out of this financial and legal mire, which has produced anger, distrust, accusations, finger pointing and a major labor strike, is to be found, it will have to be a joint effort based on cooperation by the parties and not judicial fiat.

. . .

A word to the wise has not yet been sufficient and so it is hoped that its repetition here will prompt the parties to negotiate without ceasing until a fair accord in [sic] reached. The inability or unwillingness to do so will not produce a winner and a loser but the premature fall of proud warriors whose last struggle will be overshadowed by a failure to sense their need for each other.

120 L.R.R.M. (BNA) 2198, 2205 (W.D. Pa. 1985).

293. 11 U.S.C.A. § 1113(c) (West Supp. 1985).

294. One bankruptcy court has suggested that perhaps the debtor's burden of proof on clearly balancing the equities in favor of rejection is heavier than the normal preponderance of the evidence standard. *See In re K & B Mounting, Inc.*, 50 Bankr. 460, 466-67 (Bankr. N.D. Ind. 1985) ("[T]he debtor's counsel has the burden of proving that the balance of

The word "clearly" is merely intended to assure that rejection is not warranted where the equities balance exactly equally on each side. . . . Of course, the equities will almost always balance in favor of one resolution or another. In such cases, the court will surely rule in accordance with the tilt of the balance.²⁹⁵

Thus, if a bankruptcy court has any doubts about whether the balance favors rejection, the court must deny rejection. Rejection may be granted only where the balance clearly favors rejection.

2. *The Equities to be Balanced*

After the 1984 legislation the question remains just what equities are to be balanced. In interpreting the phrase "balancing of the equities," we must examine not only the Supreme Court's language in *Bildisco*, but the language of the Third Circuit opinion which was affirmed in *Bildisco*, and the language of the *Kevin Steel* and *Brada Miller* opinions, both discussed and approved by the Supreme Court in *Bildisco*. All of these cases give meaning to the "balancing of the equities" standard.²⁹⁶ Based on these four opinions, the various equities to be balanced can be grouped into three categories: (a) factors concerning the relationship between the parties prior to rejection, (b) the possibility of successful reorganization with or without rejection, and (c) the consequences of rejection.

a. *The Relationship Between the Employer and the Union*

Prior to the 1984 amendments, the questions considered by the courts involving the labor relations of the debtor and the union included the following:

1. Were reasonable efforts to negotiate a modification of the contract made by both the debtor and the union?²⁹⁷
2. Is the debtor employer motivated by a desire to get rid of the union?²⁹⁸
3. Has the debtor employer committed unfair labor practices, apart from seeking to terminate the collective bargaining agreement?²⁹⁹

The first question is largely eliminated as a factor because of the more specific bargaining requirement of section 1113. With section 1113's imposition of an actual duty to bargain in good faith, any questions about the sufficiency of negotiations will have been settled before the court reaches the balancing process. The bankruptcy

the equities *clearly favors* rejection. The modifying adverb suggests that a preponderance of the evidence will not be sufficient." *Id.*, quoting S.B. BERNSTEIN, *BANKRUPTCY PRACTICE AFTER THE AMENDMENTS ACT OF 1984* 134 (PEC 1984)).

295. 130 CONG. REC. S8892 (daily ed. June 29, 1984). Senator Dole commented that "the court will apply the balancing of equities test enunciated in *Bildisco*, with a clarification of that standard to ensure that rejection is accomplished only where the equities balance clearly in favor of rejection." *Id.* at S8890.

296. See also *In re Parrot Packing Co.*, 42 Bankr. 323 (N.D. Ind. 1983); *In re Alan Wood Steel Co.*, 449 F. Supp. 165 (E.D. Pa. 1978); *Bohack Corp. v. Truck Drivers Local Union No. 807*, 431 F. Supp. 646 (E.D.N.Y. 1977), *aff'd*, 567 F.2d 237 (2d Cir. 1977); *In re Overseas Nat'l Airways, Inc.*, 238 F. Supp. 359 (E.D.N.Y. 1965).

297. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 526 (1984); *In re Brada Miller Freight Sys.*, 702 F.2d 890, 900 (11th Cir. 1983).

298. *In re Brada Miller Freight Sys.*, 702 F.2d 890, 901 (11th Cir. 1983); *Shopmen's Local Union No. 455 v. Kevin Steel Prod.*, 519 F.2d 698, 707 (2d Cir. 1975).

299. *Shopmen's Local Union No. 455 v. Kevin Steel Prod.*, 519 F.2d 698, 707 (2d Cir. 1975).

court's impression, however, of the willingness of each party to make accommodations will no doubt influence its inevitably subjective decision whether the equities clearly balance in favor of rejection.

The second and third questions remain relevant as factors in the balancing process. The court will still be free to consider whether the employer is motivated by antiunion animus or a desire to get rid of the union or its contract in reaching its decision on rejection.³⁰⁰ In addition, the question whether the debtor has committed any unfair labor practices under the NLRA will continue to be relevant to rejection in that it reduces the equities on the employer's side and may indicate an antiunion

300. Rep. Morrison, in his analysis of § 1113, stated that "[i]t was also our understanding that a chapter 11 reorganization case that is brought for the sole purpose or [sic] repudiating or modifying a collective bargaining agreement is a case brought in 'bad faith.'" 130 CONG. REC. H7496 (daily ed. June 29, 1984).

Picking up on Rep. Morrison's comment, at least two of the cases decided under § 1113 have phrased this factor as a question of whether the debtor filed the bankruptcy *solely* to rid itself of the collective bargaining agreement. See *In re Salt Creek Freightways*, 47 Bankr. 835, 841 (Bankr. D. Wyo. 1985) and *In re Carey Transp.*, 50 Bankr. 203, 212 (Bankr. S.D.N.Y. 1985). It should be noted, however, that an antiunion motive may be relevant in balancing equities even if it is not the *sole* motive for filing bankruptcy and seeking to reject the contract.

On the other hand, the court in *Carey Transp.* rejected the issue of whether the debtor filed bankruptcy "*solely* to disencumber itself from the collective bargaining agreement" as a relevant factor in the balancing process. The court stated:

[This court] is loathe to attach any significance to whether or not the Union asserts a claim that the case was filed solely to jettison its union contract. That issue is more appropriate fodder for dismissal considerations under § 1112(b) of the Code, or for a motion by a party in interest such as the Union here . . . to appoint a trustee or examiner under Code § 1104.

50 Bankr. 203, 212-13 (Bankr. S.D.N.Y. 1985).

In addition to using motive as a factor in balancing the equities, a more drastic approach to opposing rejection has been to attack the entire bankruptcy filing as being in bad faith. This has been unsuccessful so far, even in the infamous case of *Continental Airlines*, in large part because it is very difficult to prove that the sole reason for filing bankruptcy was rejection of the debtor's collective bargaining agreement. See *In re Continental Airlines Corp.*, 38 Bankr. 67 (Bankr. S.D. Tex. 1984). For a discussion of the general "good faith" requirement under the Bankruptcy Code, see 3 *BROKEN BENCH REVIEW* 9 (Feb. 1984).

In cases involving rejection of a collective bargaining agreement, it is likely that any debtor who has filed a bankruptcy petition in bad faith will not be willing to bargain in good faith. Consequently, motive will be litigated most often under § 1113's requirement to meet and confer in good faith. 11 U.S.C.A. § 1113(b)(2) (West Supp. 1985). For an example of a pre-§ 1113 case under *Bildisco*, illustrating a connection between the debtor's reason for filing bankruptcy and its bargaining efforts, see *In re C & W Mining Co.*, 38 Bankr. 496 (Bankr. N.D. Ohio 1984), in which the court found that the debtor had not made reasonable efforts to reach agreement on modifications prior to rejection. The debtor's president admitted he was antiunion, had threatened to "bust" the union by filing a Chapter 11 petition, and had opened a nonunion coal mine to compete with the unionized one. *Id.* at 503-04.

Some debtors-in-possession seem to have believed that under pre-*Bildisco* law rejection of a collective bargaining agreement somehow enabled them to reject the union. In *In re Southern Elec. Co.*, 23 Bankr. 348 (Bankr. E.D. Tenn. 1982), the debtor moved to reject its collective bargaining agreement, and in its proposed reorganization plan stated that it intended "to operate as a non-union plant in the future." *Id.* at 350. The debtor told the union in its letter purporting to reject the contract that "my main desire is to operate in a union free environment. . . . I do believe the employees of Southern Electronics would be better off without union representation." *Id.* at 362-63. In approving the debtor's application for rejection, the bankruptcy court pointed out that the debtor may still be obligated to bargain with the union in spite of rejection. *Id.* See also *In re Kirkpatrick*, 34 Bankr. 767 (Bankr. 9th Cir. 1983) (debtor announced the day after filing bankruptcy that the business would no longer be operating as a union shop); *In re Reserve Roofing Florida, Inc.*, 21 Bankr. 96 (Bankr. M.D. Fla. 1982) (roofing contractor will be able to go nonunion if it rejects union contract and is no longer required to hire through union hiring hall). See *supra* note 107 and *infra* notes 365-79 and accompanying text for a discussion of the duty to bargain which survives rejection.

In other pre-*Bildisco* cases, rejection was denied in large part because the debtor's sole or primary purpose in filing bankruptcy appeared to be to get rid of the union contract: *In re Tinti Constr. Co.*, 29 Bankr. 971 (Bankr. E.D. Wis. 1983); *In re Miles Mach. Co.*, 113 L.R.R.M. (BNA) 3114 (Bankr. E.D. Mich. 1982) (filed bankruptcy one month after signing new collective bargaining agreement); *In re Louis F. Sammarco Elec. Co.*, 109 L.R.R.M. (BNA) 3288 (Bankr. W.D. Tenn. 1982) (filed bankruptcy to attempt to avoid NLRB order to operate according to its collective bargaining agreement); *In re Mamie Conti Gowns*, 12 F. Supp. 478 (S.D.N.Y. 1935).

motive.³⁰¹ Although these factors would not be determinative, they are entitled to be weighed and considered in the balancing process.

b. The Possibility of Successful Reorganization

The possibility of a successful reorganization of the debtor was the major emphasis of the Court's balancing of the equities in *Bildisco*.³⁰² Broken down into its component parts, an evaluation of successful rehabilitation must include consideration of the following specific questions:

1. What is the likelihood of successful reorganization *without* rejection? If the collective bargaining agreement is affirmed, what will be the cost of doing business? What alternative ways of cutting costs exist?
2. What is the likelihood of successful reorganization *with* rejection? What proposed reduction in costs will the debtor seek to implement if operating without a contract? What are the predicted terms of a new collective bargaining agreement to be negotiated after rejection?
3. What is the likelihood of *liquidation* either with or without rejection of the collective bargaining agreement?

Whether rejection will permit successful rehabilitation of the debtor will be the overriding concern of the court and will no doubt make up the bulk of the debtor's case for rejection. In large part, it will involve a comparison of the costs of operating the business under the collective bargaining agreement with the costs of operating the business without the collective bargaining agreement or under the debtor's proposed contract modifications, which it will seek to implement upon approval of rejection.³⁰³ The rejection decision must also include an examination of whether other alternatives exist for cutting operating costs in addition to or instead of reducing rates under the collective bargaining agreement. To a great extent, these comparisons are the same comparisons the court will have already made in determining whether the debtor's

301. The Ninth Circuit Bankruptcy Appellate Panel in *In re Kirkpatrick*, 34 Bankr. 767 (Bankr. 9th Cir. 1983), commented that it would consider the issue of improper motive in balancing the equities only "when there is evidence of a pattern of unfair labor practice or other conduct that might give rise to an inference that the debtor is improperly motivated." *Id.* at 770. The court felt that the language in *Kevin Steel* and *Brada Miller* on the existence of a debtor's unfair labor practices was "clearly directed to the concern that the business reorganization process and contract rejection power not become tools in a *continuing* campaign of unfair labor practice." *Id.* (emphasis added). If no continual pattern of unfair labor practices is established, the court is suggesting it would give little or no weight to a violation of the NLRA in balancing equities.

302. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984). See also *In re Brada Miller Freight Sys.*, 702 F.2d 890, 899 (11th Cir. 1983); *Shopmen's Local Union No. 455 v. Kevin Steel Prod.*, 519 F.2d 698, 707 (2d Cir. 1975); *Brotherhood of Ry., Airline and S.S. Clerks v. REA Express*, 523 F.2d 164, 172 (2d Cir. 1975).

303. This cost comparison contains the implication that, if the collective bargaining agreement is rejected, the debtor-employer will set whatever terms and conditions of employment, wages, and benefits it sees fit. The employer will be able to do this, without violating the NLRA, only if it first bargains to impasse on these changes as a part of its obligation to bargain with the union for a new collective bargaining agreement. See *infra* notes 364-80 and accompanying text. When an employer unilaterally changes terms and conditions of employment without bargaining first, the employer violates the duty to bargain imposed by NLRA § 8(a)(5). *NLRB v. Katz*, 369 U.S. 736, 743 (1962); 29 U.S.C. § 158(a)(5) (1982). For the duty to bargain for a new contract, see *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 534 (1984); *In re Brada Miller Freight Sys.*, 702 F.2d 890, 899 (11th Cir. 1983). Evaluation of the possibility of a successful reorganization must take into account the likelihood of negotiating a new agreement, making adjustments in the debtor's projected costs of operation to reflect possible compromises reached after bargaining for a new agreement.

proposed modifications under section 1113(b) were necessary to permit reorganization.³⁰⁴

Finally, a court must consider whether *liquidation*, as opposed to reorganization, is likely even if the collective bargaining agreement is rejected. This issue is raised only indirectly by the previous "necessity" requirement. Under the Supreme Court's emphasis in *Bildisco*, if liquidation seems likely even after rejection, then rejection should be denied. The goal of successful reorganization will not be furthered by rejection.³⁰⁵ Under section 1113, rejection should never be approved if liquidation is the probable outcome. A buyer of the business will not be bound by the collective bargaining agreement and the only effect of rejection may be to reduce the priority of some of the employees' claims for breach.³⁰⁶ Changing the priority of claim in liquidation will in no way help save the employees' jobs or the debtor's business.

c. *The Consequences of Rejection*

The more numerous but less significant factors to be balanced by the bankruptcy court involve the consequences of rejection and its impact on all the parties, including the debtor, the unionized employees, the nonunionized employees, and the debtor's other creditors. The specific questions the courts have asked about the consequences of rejection on the various parties include:

1. With regard to the debtor—
 - a. What is the likelihood and potential impact of a strike by the employees?³⁰⁷
 - b. What will be the impact of any monetary claims by employees arising from rejection and breach of the collective bargaining agreement?³⁰⁸
2. With regard to the unionized employees—
 - a. How adequate will the monetary relief be for employees through the recovery of claims against the estate?³⁰⁹
 - b. What will be the degree of hardship, and any qualitative difference in the hardship, suffered by employees as opposed to other creditors?³¹⁰
 - c. What will be the impact on employees of the loss of intangible, nonmonetary job rights, such as seniority, pension rights, and use of grievance and arbitration procedures?³¹¹

304. See, e.g., *In re Wheeling-Pittsburgh Steel Corp.*, 119 L.R.R.M. (BNA) 3277, 3287-88 (Bankr. W.D. Pa. 1985); *In re Salt Creek Freightways*, 47 Bankr. 835, 838, 841 (Bankr. D. Wyo. 1985); *In re Allied Delivery Sys.*, 49 Bankr. 700, 702, 704 (Bankr. N.D. Ohio 1985).

305. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984) ("Since the policy of Chapter 11 is to permit successful rehabilitation of debtors, rejection should not be permitted without a finding that that policy would be served by such actions.").

306. See *supra* notes 42, 56-60, 194 and accompanying text.

307. *In re Brada Miller Freight Sys.*, 702 F.2d 890, 899 (11th Cir. 1983); *In re Bildisco*, 682 F.2d 72, 80 (3d Cir. 1982).

308. *In re Brada Miller Freight Sys.*, 702 F.2d 890, 899-900 (11th Cir. 1983); *In re Bildisco*, 682 F.2d 72, 80 (3d Cir. 1982). See also *In re Salt Creek Freightways*, 47 Bankr. 835, 841-42 (Bankr. D. Wyo. 1985); *In re Carey Transp.*, 50 Bankr. 203, 212-13 (Bankr. S.D.N.Y. 1985).

309. *In re Brada Miller Freight Sys.*, 702 F.2d 890, 899-900 (11th Cir. 1983); *Brotherhood of Ry., Airline and S.S. Clerks v. REA Express*, 523 F.2d 164, 172 (2d Cir. 1975); *Shopmen's Local Union No. 455 v. Kevin Steel Prod.*, 519 F.2d 698, 707 (2d Cir. 1975).

310. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984); *In re Brada Miller Freight Sys.*, 702 F.2d 890, 900 (11th Cir. 1983).

311. *In re Brada Miller Freight Sys.*, 702 F.2d 890, 900 (11th Cir. 1983); *Brotherhood of Ry., Airline and S.S.*

- d. What is the relative position of these employees, based on their wages and benefits, compared with the debtor's nonunion employees and other employees in the same industry and geographical area?³¹²
- e. What proportion of the debtor's employees are covered by the collective bargaining agreement?³¹³
3. With regard to other creditors—
 - a. What comparative sacrifices are other creditors making?³¹⁴
 - b. What are the cost-spreading abilities of other creditors, compared to that of employees working under the collective bargaining agreement?³¹⁵
 - c. What effect would affirmation of the collective bargaining agreement have on other creditors' claims?³¹⁶

First, the impact of rejection on the debtor must be examined. Will rejection result in a strike by the employees?³¹⁷ As soon as the contract is terminated, the employees are no longer bound by its no-strike clause and are free to strike. If they do go on strike, what effect will that have on the debtor's business?

In examining the impact of employee claims arising from rejection, a bankruptcy court will generally find that the impact of such claims will be the same on the debtor as on other creditors. As the bankruptcy court in *Wheeling-Pittsburgh Steel* suggested, in seeking rejection, the employer is acting as the representative of all the other creditors in attempting to reduce payments to employees under the contract so that there will be greater funds available to satisfy other creditors' claims.³¹⁸ This pressure on the debtor-employer to advance the cause of the other creditors is rooted in the fact that, in order for a reorganization plan to be confirmed under Chapter 11, creditors representing at least one class of impaired claims must have accepted the debtor's plan.³¹⁹ Creditors will be inclined to accept a reorganization plan if they believe it is the most favorable settlement they are likely to receive. In order to make more funds available to the other creditors, the debtor must first seek to reduce wages

Clerks v. REA Express, 523 F.2d 164, 172 (2d Cir. 1975); Shopmen's Local Union No. 455 v. Kevin Steel Prod., 519 F.2d 698, 707 (2d Cir. 1975).

312. *In re Bildisco*, 682 F.2d 72, 80 n.12 (3d Cir. 1982).

313. *Id.*

314. NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984); *In re Bildisco*, 682 F.2d 72, 81 (3d Cir. 1982).

315. *In re Brada Miller Freight Sys.*, 702 F.2d 890, 900 (11th Cir. 1983).

316. NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984); *In re Bildisco*, 682 F.2d 72, 80-81 (3d Cir. 1982).

317. "[T]he debtor-in-possession who rejects a collective bargaining agreement remains an employer and is still required by the NLRA to bargain . . . and . . . its employees retain their right to strike should negotiations fail." *In re Bildisco*, 682 F.2d 72, 80 (3d Cir. 1982). See *supra* notes 150-53 and accompanying text.

It is ironic that in *Wheeling-Pittsburgh Steel*, the first case that has attracted nationwide attention under § 1113, the bankruptcy court focused on the need for labor stability as the major reason for finding the debtor's proposal for extending the contract from one more year to five more years a necessary modification. Yet, in balancing the equities, the court never mentioned or considered the possibility of a strike if rejection was granted, even though the Steelworkers Union had announced before rejection was granted that they would probably call a strike. *In re Wheeling-Pittsburgh Steel Corp.*, 119 L.R.R.M. (BNA) 3277, 3287-88 (Bankr. W.D. Pa. 1985); Wall St. J., July 16, 1985, at 8, col. 3. The steelworkers in fact went on strike four days after the court granted rejection in July 1985. The strike was eventually settled three months later, in October 1985. See Wall St. J., July 22, 1985, at 3, col. 1, and Wall St. J., Oct. 28, 1985, at 2, col. 3.

318. 119 L.R.R.M. (BNA) 3277, 3288 (Bankr. W.D. Pa. 1985).

319. See 11 U.S.C. §§ 1126, 1129 (1982).

and benefits by negotiating favorable contract modifications. If the negotiations fail and the contract is rejected, any employee claims for first priority administrative expenses will be kept to a minimum, and any breach of contract claims, which are not entitled to administrative expense treatment, will become prepetition unsecured claims.³²⁰ The percentage at which prepetition unsecured claims are ultimately paid is usually very low, if they receive any payment at all.³²¹ Therefore, the reality of rejection is that employees will receive lower pay and fringe benefits, and, even though they will have increased claims for breach of contract, they can expect to receive little or nothing in payment of these claims. They will be in the same position with regard to their contract claims as all other prepetition unsecured creditors of the debtor. The only creditors who ordinarily have any chance of significant payment are secured creditors or those with first priority claims for administrative expense. Thus, the issues of priority and the need to obtain acceptance of a reorganization plan from at least one class of creditors—usually the secured creditors—provide the impetus for the debtor to represent the nonemployee creditors in the quest for rejection of the contract.³²²

In contrast to the impact of resulting employee claims on the debtor and on other creditors, the appellate courts have directed the bankruptcy courts to evaluate the impact of rejection on the employees themselves and to compare this impact with the sacrifices being made by other creditors in furtherance of the rehabilitation effort. These issues will have already been considered by the court in determining whether the debtor's proposed modifications of the contract assured fair and equitable

320. See *supra* notes 57–60 and accompanying text. For example, past due pension plan payments based on services rendered prior to the bankruptcy filing will become prepetition unsecured claims.

321. See, e.g., *In re Carey Transp.*, 50 Bankr. 203, 213 (Bankr. S.D.N.Y. 1985) (prepetition unsecured claims will most likely receive no payment). See also D. STANLEY & M. GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* (1971). In one study of Bankruptcy Act Chapter 11 plans, the amounts paid to priority creditors and general unsecured creditors differed greatly. Priority creditors were almost uniformly paid in full. Unsecured creditors with prepetition claims were paid an average of 19% of their claims in plans calling for a single payment. In multiple payment plans, unsecured creditors were paid an average of 10% immediately and were scheduled to be paid another 25% of their claims later. *Id.* at 142–43.

322. The *Wheeling-Pittsburgh Steel* case provides a concrete example of the fact that in many ways rejection involves a conflict between the union and the employees on the one hand and the debtor's other creditors on the other, with the debtor simply caught in the middle. Impasse was reached in the negotiations between Wheeling-Pittsburgh Steel and the Steelworkers Union before bankruptcy was filed because the union insisted that the company first obtain concessions from its lenders before the union would consider additional wage concessions. The banks agreed to make some concessions, but only on the condition that the company pledge all its current assets as collateral on the old debt. The union responded by agreeing to concessions but only on the condition that the company *not* pledge its current assets as security for its old debt. *In re Wheeling-Pittsburgh Steel Corp.*, 119 L.R.R.M. (BNA) 3277, 3280 (Bankr. W.D. Pa. 1985). Thus, the impasse that existed was between the union and the company's lenders, not between the union and the company.

This tension between the union and the debtor's other creditors continues. On October 24, 1985, the debtor's creditor banks filed objections in bankruptcy court opposing the settlement reached between Wheeling-Pittsburgh Steel and the Steelworkers Union in an effort to end the three-month-old strike. The banks objected to the \$18 per hour wage cost agreement, arguing that the company should not have agreed to pay more than the \$15.20 per hour figure included in the debtor's § 1113(b) proposal on necessary modifications. The banks' representative indicated, however, that the banks might accept a \$16 per hour wage cost. The intervention by the banks in opposing court approval of the labor accord suggests the union should have been negotiating directly with the banks, not the company, on a new collective bargaining agreement. See *Wall St. J.*, Oct. 25, 1985, at 5, col. 2. The bankruptcy court, however, approved the strike settlement agreement over the lenders' objections. *Wall St. J.*, Oct. 28, 1985, at 2, col. 3.

treatment of the affected parties.³²³ An examination of the adequacy of monetary relief for employees through the recovery of claims in bankruptcy will lead to the conclusion that such relief is inadequate because employees will normally recover very little, if anything, as unsecured creditors. Consequently, the real question is how much will employees suffer from the loss of income and other contractual benefits. One way of examining the degrees of hardship suffered by the parties, and any "qualitative differences between the types of hardship" per *Bildisco*,³²⁴ is to look at the cost-spreading abilities of the various creditors, and compare the cost-spreading abilities of trade creditors with that of employees. Because employees are usually much more vulnerable as individuals to the possible loss of income than are business creditors, a recognition of any qualitative difference will normally weigh in favor of the employees and against rejection. On the other hand, if rejection will guarantee a successful reorganization which will save jobs, whereas liquidation may destroy jobs, then loss of a portion of one's income may be a smaller hardship than collecting unemployment benefits and looking for another job. Likewise, the layoff of some employees as a result of rejection would be preferable to the layoff of all employees.

The appellate courts have also insisted that recognition be given to the employees' loss of intangible, nonmonetary job rights, such as grievance and arbitration procedures, in balancing the equities.³²⁵ There is the possibility that these

323. See *supra* notes 216-26 and accompanying text.

324. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984).

325. See *In re Brada Miller Freight Sys.*, 702 F.2d 890, 900 (11th Cir. 1983) (court should consider adequacy of relief provided by claims against debtor, especially "since many of the benefits received by employees under collective bargaining agreements are non-monetary and generally incapable of providing a basis for a damage award").

The loss by employees of nonwage contractual rights and benefits was a somewhat more serious problem under the Bankruptcy Act than under the Bankruptcy Code. Under the Act, only liquidated claims, such as those for wages or vacation pay, would be allowed and entitled to payment. Unliquidated or contingent claims, such as pension claims, would not be estimated and allowed. See generally 3 L. KING, *COLLIER ON BANKRUPTCY* ¶ 502.03 (15th ed. 1979). Consequently, the bankruptcy court may now estimate and assign a value to claims for future pension or health benefits which would accrue during the remaining term of a rejected contract. On the other hand, because recovery of unsecured claims even if estimated and allowed is usually so rare, this difference between the Act and the Code may be of little practical significance.

In balancing the equities under the Act, the appellate courts were concerned about the employees' loss of all unliquidated claims. See *Brotherhood of Ry., Airline and S.S. Clerks v. REA Express*, 523 F.2d 164, 172 (2d Cir. 1975) ("equities [include] the employees' inability in Chapter XI proceedings to evaluate and obtain compensation for loss of their pension, welfare, seniority and other contract rights"); *Shopmen's Local Union No. 455 v. Kevin Steel Prod.*, 519 F.2d 698, 707 (2d Cir. 1975) (by allowing rejection, court may be "depriving the employees affected of their seniority, welfare and pension rights, as well as other valuable benefits which are incapable of forming the basis of a provable claim for money damages" (quoting *In re Overseas Nat'l Airways*, 238 F. Supp. 359, 361-62 (E.D.N.Y. 1965))). For an example of a district court applying this requirement in balancing the equities, see *In re Parrot Packing Co.*, 42 Bankr. 323, 333 (N.D. Ind. 1983).

The loss of intangible, nonmonetary contract rights could be avoided if the courts had the power to grant only partial rejection of a collective bargaining agreement, leaving intact those portions containing the noneconomic items. See *supra* note 206 (discussion of noneconomic items). Although partial rejection has been suggested as a preferable approach to collective bargaining agreements, the courts have generally found that it is not permitted by bankruptcy law. For the suggestion that partial rejection would be appropriate for collective bargaining agreements in order to preserve the less costly but important aspects of labor contracts, see Note, *The Bankruptcy Law's Effect on Collective Bargaining Agreements*, 81 COLUM. L. REV. 391, 403-04 (1981). For court opinions refusing to grant partial rejection, see, e.g., *In re Braniff Airways*, 25 Bankr. 216, 217-18 (Bankr. N.D. Tex. 1982); *In re David A. Rosow Inc.*, 9 Bankr. 190, 193 n.5 (Bankr. D. Conn. 1981). At least one bankruptcy court, however, has granted rejection of a collective bargaining agreement, while ordering the debtor to maintain in effect all provisions of the contract except wages and salaries. In *In re San Jose Unified School Dist.*, No. 583-02387-A (Bankr. N.D. Cal. 1983) (order granting rejection of two collective bargaining agreements), the court granted rejection on the following two conditions: (1) all terms and conditions

rights may be lost if employees are required to work for any length of time without any collective bargaining agreement in effect. Although the debtor is obligated to bargain for a new contract once rejection is granted, it will be difficult to predict whether bargaining will be successful in producing a new contract.

Finally, in examining the impact of rejection on employees, the courts have suggested that one factor to be examined is a comparison of the relative financial position of the employees involved with that of other employees working in the same industry. Presumably, if the employees involved are relatively well paid, the degree of hardship they may suffer through a wage reduction will be less. Comparatively high wages in the industry may imply the company's competitive position has suffered from its high labor costs, and rejection will be more important for successful reorganization than if the debtor's wage costs had been relatively low.

In contrast to evaluating the impact on employees, the Supreme Court has also suggested that the bankruptcy court consider "the reduced value of the creditors' claims that would follow from affirmance."³²⁶ This factor does not need to be evaluated, as it will always weigh in favor of rejection. If the debtor continues to pay employees at a higher contract rate, the debtor will have less money to pay other creditors.

The entire rejection controversy ultimately is reduced to who is going to receive whatever money the debtor's assets or business generates. On the one hand, the other creditors argue that maintenance of the contract wage and benefit rates results in a preference being granted to employee or union creditors at the expense of other creditors. On the other hand, employees and unions argue that their entire livelihood depends on their employment with the debtor and they should not be asked to reduce their standard of living unless similar sacrifices will be made by the debtor and all other creditors. Because it is impossible to determine the actual sacrifices made by trade creditors, except in terms of the percentage of payment the claims receive, any court's evaluation of the comparative impact of rejection on people's lives will remain largely hypothetical.

Under the 1984 amendments to the Bankruptcy Code, the court should approve an application for rejection if the court finds that the balance of equities *clearly* favors rejection. By relying on *Bildisco* as the basis of the balancing standard, Congress, by implication, has endorsed the factors listed above, which have been previously used by the courts of appeal and were approved by *Bildisco*, in carrying out this balancing process.

of the rejected contracts, other than wages and salaries, "shall remain in effect until . . . the rejection agreements would have expired by their terms" unless the parties earlier agree on new terms and conditions; and (2) the school district shall pay employees at the 1981-82 salary schedules set forth in the rejected agreements for the period the contracts would have remained in effect, unless a new salary schedule is agreed on in the meantime.

The loss of nonmonetary rights could also be avoided if rejection were conditioned on the negotiation by the parties of a new collective bargaining agreement and its inclusion in the debtor's Chapter 11 reorganization plan.

326. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984).

D. Court-Ordered Interim Changes Under Section 1113

The major thrust of section 1113 is to provide a framework for the negotiation of contract modifications in order to avoid rejection if possible. In addition, section 1113 overruled the second half of *Bildisco* by prohibiting the employer from terminating the contract unilaterally on filing bankruptcy. In drafting the compromise version of section 1113, however, the conference committee had to find a way to meet the objections of those who felt the debtor needed some freedom to make immediate changes on filing bankruptcy. Otherwise, the possibility of a successful reorganization might be jeopardized by the two-to-three-week time period required before a rejection application could be heard. Accordingly, a subsection was added to section 1113 authorizing the court to approve interim changes if they are essential to the continuation of the business. Subsection (e) of section 1113 provides:

If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.³²⁷

This provision was designed to provide relatively quick relief for that debtor who would otherwise be forced into liquidation.³²⁸

The language of this subsection is ambiguous with respect to the exact time at which a request for interim changes may be filed and such changes authorized. The statute specifies that the court may authorize the changes "during a period when the collective bargaining agreement continues in effect." Although it further provides that implementation of any interim changes "shall not render the application for rejection moot," it does not specifically require that changes be sought only in conjunction with a rejection application. Two members of the conference committee, however, expressed their understanding that the request for interim changes may be made only if the debtor has filed for rejection:

The House conferees accepted subsection (e) permitting the court to authorize interim changes in the collective bargaining agreement on the understanding: that, as the final sentence of the subsection makes clear, a motion for such interim relief may only be made in conjunction with an application for rejection and any authorization shall be effective only for the period for considering and ruling on the application stated in subsection (d).³²⁹

327. 11 U.S.C.A. § 1113(e) (West Supp. 1985).

328. 130 CONG. REC. S8888 (daily ed. June 29, 1984) (remarks of Sen. Thurmond).

An earlier version of this emergency procedure was sponsored by the National Bankruptcy Conference and introduced in the Senate. 130 CONG. REC. S6126 (daily ed. May 21, 1984). It was deleted prior to the legislation's being sent to the conference committee, but served as the basis for the eventual compromise which emerged from conference. The National Bankruptcy Conference draft was identical to the provision adopted except that it did not include the term "interim" and did not contain the last sentence of § 1113(e). In addition, a phrase referring to the continuation of necessary services by a municipality was deleted from the final language. *Id.*

329. 130 CONG. REC. S8899, H7496 (daily ed. June 29, 1984) (statement of Rep. Hughes and Rep. Morrison on H.R. 5174).

This interpretation, however, may conflict with the provision's emergency nature and the debtor's possible need for immediate relief. Because an application for rejection cannot be filed immediately upon filing for bankruptcy, but only after the debtor has made its proposal to the union under section 1113(b), interim changes, if essential to continue the business, may be needed before a request for rejection has been filed.³³⁰ Furthermore, if the parties bargain successfully on the debtor's proposal and reach agreement on contract modifications, the debtor may never need to file for rejection. Therefore, in some cases the authorization of interim changes may occur prior to and in the absence of any rejection application.

As explained above, Congress intended the old contract to remain in effect until rejection is approved.³³¹ Consequently, if one relies on the first phrase of section 1113(e), "during a period when the collective bargaining agreement continues in effect," interim changes may be sought and authorized at any point after the bankruptcy petition is filed. The power of the court to authorize such changes appears to continue indefinitely until rejection is granted, if it is sought, or until the collective bargaining agreement expires by its own terms.³³²

Once the court authorizes interim changes in the collective bargaining agreement, these changes presumably remain in effect only as long as the contract remains in effect. These changes are labeled "interim" indicating their temporary nature and are described as changes "in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement."³³³ Because they are changes in the contract, their life span is tied to that of the contract. This is reinforced by the final sentence of section 1113(e): "The implementation of such interim changes shall not render the application for rejection moot." Once rejection is granted or denied, the interim changes presumably end. The courts have recognized the temporary nature of these interim changes in the few reported cases decided under section 1113(e).³³⁴

Another question which arises concerns the scope of any interim changes the court may authorize. The legislative history includes a statement of two members of the conference committee interpreting section 1113(e): "In deference to the overall policy of the provision which is to encourage the parties to reach their own agreement through collective bargaining, the court in framing any such relief may not go beyond the proposal made by the trustee pursuant to subsection (b)(1)(A)."³³⁵ Under this

330. 130 CONG. REC. S8891 (Sen. Hatch's remarks discussing the required bargaining process, describing the emergency provision as allowing the business to petition for interim relief "at any time" during the required negotiations).

331. See *supra* text accompanying notes 171-76.

332. In one of the few reported cases construing § 1113(e), *In re Salt Creek Freightways*, 46 Bankr. 347 (Bankr. D. Wyo. 1985), the union argued that interim changes could be authorized only during "the period following an unsuccessful attempt at rejection." *Id.* at 350. This argument appears frivolous based on the last sentence of § 1113(e), specifying that any interim changes will not make the rejection application moot. The court quickly dismissed the union's argument, ruling that the statutory phrase "a period when the collective bargaining agreement continues in effect" includes several time periods: the period between the bankruptcy filing and the filing of the rejection application, the period between the rejection filing and the court's ruling on rejection, and any period following a court's denial of rejection. *Id.* at 351.

333. 11 U.S.C.A. § 1113(e) (West Supp. 1985).

334. See, e.g., *In re Russell Transfer*, 48 Bankr. 241, 243, 244 (Bankr. W.D. Va. 1985); *In re Salt Creek Freightways*, 46 Bankr. 347, 351 (Bankr. D. Wyo. 1985); *In re Wright Air Lines*, 44 Bankr. 744, 746 (Bankr. N.D. Ohio 1984).

335. 130 CONG. REC. S8899, H7496 (daily ed. June 29, 1984) (statement of Rep. Hughes and Rep. Morrison).

view, the scope of any interim changes may not be broader than the proposed changes contained in the debtor's bargaining proposal made under section 1113(b). The difficulty with actually measuring the scope of interim changes by the scope of the debtor's proposed necessary modifications is that the debtor may not yet have formulated its section 1113(b) proposal. If interim changes may be sought and authorized at any time after filing bankruptcy, this may occur before and in the absence of proposed modifications.

On the other hand, the phrase used in subsection (e), "if essential to the continuation of the debtor's business," is certainly no broader than the language of subsection (b), "necessary to permit reorganization." If anything, it may imply a more limited scope for interim changes. Continuation of the business may be for a shorter period of time and of a more temporary, emergency nature than a reorganization. A temporary continuation of the business may be required for an orderly liquidation, even though no reorganization is contemplated. Because a successful reorganization may require more fundamental and longer-term changes in operations than temporary ones pending liquidation, some modifications may be deemed necessary under subsection (b) but not essential under (e).³³⁶ Thus, the language of subsection (e) may indicate a more limited scope for interim changes than for contract modifications necessary for reorganization even if the section 1113(b) bargaining proposal itself is ignored.³³⁷

An additional question, related to the issue of what changes may be authorized, is the question of what showing is necessary to justify the court's authorization of these interim changes. Several members of the conference committee expressed their opinion that the phrases "essential to the continuation" of the business and "in order

336. The bankruptcy court in *In re Allied Delivery Sys.*, 49 Bankr. 700 (Bankr. N.D. Ohio 1985), agreed that the scope of interim changes is narrower than the scope of modifications deemed necessary under § 1113(b). The court construed the term "necessary" as used in § 1113(b) as a less stringent standard than the term "essential" used in § 1113(e). The court felt that the word "necessary" had to be read as a term of lesser degree than "essential" in order to permit some bargaining give and take over the debtor's proposed modifications. Otherwise, if the debtor agreed to any terms other than those contained in its initial proposal, it would be admitting the initial modifications were not, in fact, necessary to the reorganization of its business. The court's difficulty in making sense out of the synonymous, yet varied, terms used in § 1113 is in large part due to the court's attempt to create a meaningful good faith bargaining requirement out of § 1113's strange bargaining procedure. See *supra* notes 244-92 and accompanying text.

The terms "necessary" and "essential" are synonymous when not considered as a part of the phrases in which they are used. The word "necessary" used in § 1113(b) is defined as meaning "absolutely required" or "essential." G & C MERRIAM CO., WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1510-11 (1981). Similarly, the word "essential" is defined in part by use of the synonyms "necessary" and "indispensable." *Id.* at 777.

337. Congress included two phrases in § 1113(e) describing under what circumstances interim changes may be authorized: (1) "if essential to the continuation of the debtor's business" or (2) "in order to avoid irreparable damage to the estate." There is little clue in the legislative history to what the second phrase adds to the requirements of the section. It is difficult to imagine what kind of immediate relief might be needed to avoid irreparable damage to the estate that would not also be essential to the continuation of the business. The "avoid irreparable damage" phrase was part of the National Bankruptcy Conference's proposed legislation and was included unchanged in the final bill. Senator Thurmond's remarks when introducing the NBC's draft indicate that this language simply reinforces the emergency nature of the interim change provision:

There remains the possibility that during the [period the contract remains in effect] the debtor may find himself in need of emergency relief in order to continue his business operations. The NBC provisions address this contingency by providing that the court, after notice and a hearing, may authorize the trustee to make changes in the agreement if essential to the continuation of the debtor's business or to avoid irreparable damage to the estate.

130 CONG. REC. S6084 (daily ed. May 21, 1984).

to avoid irreparable damage to the estate" incorporate the standard for rejection found in *REA Express*: interim changes should be allowed only if the debtor's business would otherwise collapse.³³⁸ At least one bankruptcy court has agreed, ruling that under the *REA Express* standard "a debtor seeking interim relief must show a more immediate level of economic emergency than it would need to show as support for an application for rejection."³³⁹ The more stringent standard of *REA Express*, as compared to the "balancing of the equities" standard, seems appropriate in light of the purpose behind section 1113(e). All members of the conference committee who spoke on the floor of Congress described section 1113(e) as an emergency relief provision only, and Senator Packwood expressed the hope that "these emergency relief provisions will have only limited and secondary consequences and application."³⁴⁰

The few reported cases under section 1113(e) indicate that the bankruptcy courts are taking their task seriously and requiring debtors to present meaningful evidence that interim relief really is essential to the continuation of the business before it will be approved. In *In re Wright Air Lines*,³⁴¹ the debtor-in-possession must have thought its application for interim relief was largely pro forma and would be granted automatically because it presented what the court characterized as "largely incomplete" financial information with no reliable projections of income and expenses over the next two months.³⁴² The debtor was seeking modification of the collective bargaining agreement to save approximately \$71,000 of pilot training expenses per month, while the airline admitted its overall monthly loss was approximately \$800,000. The court found that though the cost of pilot training may be burdensome and uneconomical, the debtor did not show that this relatively minor relief, less than ten percent of each monthly loss, was essential to permit the company to continue operations. Consequently, the court ruled that the debtor did not meet its relatively heavy burden of proof under section 1113(e).³⁴³ The court's denial of interim relief appeared to be a preliminary indication of its inclination to deny rejection of the collective bargaining agreement, not because rejection of the collective bargaining agreement would not be vital to the company's successful rehabilitation, but because successful rehabilitation appeared impossible even with rejection.

338. 130 CONG. REC. H7496 (daily ed. June 29, 1984) (remarks of Rep. Morrison); *id.* at S8898 (remarks of Sen. Packwood). Rep. Lungren, however, remarked that although he would agree the standard for emergency relief is extremely narrow, "whether or not it is precisely the REA standard . . . is open to question." *Id.* at H7496. On the other hand, Gibson states that the legislative history of § 1113 "makes it plain" that a court should apply the *REA Express* test. Gibson, *supra* note 190 at 333 and n.31.

339. *In re Salt Creek Freightways*, 46 Bankr. 347, 350 (Bankr. D. Wyo. 1985).

340. 130 CONG. REC. S8898 (daily ed. June 29, 1984).

341. 44 Bankr. 744 (Bankr. N.D. Ohio 1984).

342. The debtor's chief witness admitted the financial figures were based on assumptions which were not valid for purposes of making financial projections. *Id.* at 745.

343. *Id.* at 745-46. The court further pointed out that the debtor failed to address a major problem resulting from the temporary nature of the requested relief. The employer was asking the court to authorize it to suspend the seniority provisions of the contract so it could recall pilots without regard to contract seniority. If the debtor's pending rejection application was eventually denied and the collective bargaining agreement's term reinstated, any pilots recalled out of seniority order would have to be laid off and those pilots with the greater contract seniority recalled. The court commented, "Thus, any training program in which they were involved would appear to be left, so to speak, in mid-air." *Id.* at 746.

In a second reported case decided under section 1113(e), *In re Salt Creek Freightways*, the court, after adopting the *REA Express* standard for authorizing interim relief, ruled for the company and granted interim relief over the union's objections.³⁴⁴ In this case, it was the union that failed to produce evidence. The debtor presented a prima facie case for interim relief and the union failed to offer any evidence that the debtor could stay in business without the proposed interim changes.³⁴⁵ It is interesting to note that the debtor requested interim relief even though it had not yet filed for rejection of the collective bargaining agreement. The debtor, however, had already submitted its proposal of necessary modifications to the union and bargaining was underway.³⁴⁶ The court granted interim relief, reducing wages and fringe benefits, but specified that the interim relief was temporary, in effect only until either the contract expired in two months or a new collective bargaining agreement was negotiated, whichever occurred first.³⁴⁷

In a third reported decision, *In re Russell Transfer*,³⁴⁸ the bankruptcy court compromised by granting the debtor the interim relief requested, a twenty percent reduction in union employees' wages and benefits, but at the same time ordered a ten percent reduction in nonunion administrative employees' wages to meet the union's argument that the unionized employees should not bear more than their share of the reductions required.³⁴⁹ The court again emphasized the temporary nature of the interim relief, describing it as "an emergency stopgap measure" to give the parties time to resolve their differences through negotiation, and specified that the order was effective for only ninety days.³⁵⁰

Thus, under the 1984 amendments, the collective bargaining agreement remains in effect on filing bankruptcy, but the court may authorize interim changes of a temporary and emergency nature. The effect of section 1113(e), allowing the bankruptcy court to authorize changes in the collective bargaining agreement, is to insulate the employer from any unfair labor practice charges under the NLRA for unilaterally modifying the contract without the union's consent in violation of section 8(d). Congress obviously intended section 1113(e) to take precedence over section 8(d) of the NLRA. Because these changes are made per court order in bankruptcy proceedings, the employer has not committed a violation of the NLRA. On the other hand, the employer has not been given a free rein to make whatever changes it wants as in *Bildisco*, but the changes are limited in scope and subject to court scrutiny. Furthermore, with the notice and hearing requirements, the union has been assured a chance to be heard and to have its position considered prior to court approval of any requested changes.

344. 46 Bankr. 347, 349-51 (Bankr. D. Wyo. 1985).

345. The union unsuccessfully relied on its strange argument that interim relief could be granted only *after* a petition for rejection of the contract had been denied. See *supra* note 331.

346. 46 Bankr. 347, 348 (Bankr. D. Wyo. 1985).

347. *Id.* at 351.

348. 48 Bankr. 241 (Bankr. W.D. Va. 1985).

349. *Id.* at 244. For criticism of this compromise as beyond the power of the court, see *In re Carey Transp.*, 50 Bankr. 203, 210 n.4 (Bankr. S.D.N.Y. 1985).

350. 48 Bankr. 241, 243, 244 (Bankr. W.D. Va. 1985).

In spite of any interim changes, the underlying collective bargaining agreement remains in effect and the employees and the union should be able to file claims in bankruptcy based on breach of contract for any wages or benefits the employees may have lost by virtue of the interim changes. These changes constitute a breach of contract just as rejection results in a breach. The priority of these contract claims will be dependent on their nature.³⁵¹

If interim changes are authorized but no application for rejection is ever filed, a situation not contemplated by Congress, the changes will apparently continue until the underlying contract expires. If a rejection petition is filed but rejection is denied, then the changes end and the contract terms once again control the parties' relationship. If rejection is granted, however, the statute provides no guidance on what happens to these interim changes. In fact, all of section 1113's provisions, not just section 1113(e), end with a ruling on rejection. There is no language in the statute describing what happens next. Presumably, relevant labor law obligations will control the parties' conduct after the provisions of section 1113 have been satisfied. The next section examines these obligations first in the context of the denial of rejection and then with relation to the approval of rejection.

E. The Impact of Rejection on the Debtor's Labor Law Obligations

1. When Rejection is Denied

If the bankruptcy court denies the debtor's rejection application, the collective bargaining agreement continues in effect. It may either be assumed by the debtor,³⁵² or it may simply "ride through" the bankruptcy proceedings and emerge unaffected if it has not already expired by its own terms.³⁵³ Denial of rejection does not automatically result in assumption of the collective bargaining agreement.³⁵⁴ Although section 1113 purports to govern both rejection and assumption of collective bargaining agreements,³⁵⁵ it contains no further provisions on assumption. Consequently, assumption of a collective bargaining agreement apparently continues to be subject to the provisions of section 365. Under section 365, a contract may not be assumed unless the debtor promptly cures any breach of the contract and provides

351. If the claims are for wages and other forms of compensation such as fringe benefits earned after the bankruptcy was filed, the employees' claims are entitled to first priority as administrative expenses, regardless of acceptance or rejection, based on the reasonable value of their services. *See supra* notes 57-58. Before any interim changes in wages or benefits are authorized, the collective bargaining agreement presumably sets the reasonable rate of pay. Once the court authorizes interim changes in wage or benefit rates, it may or may not continue to regard the contract rate as the reasonable value of the employees' services. More likely, it will regard its order authorizing the interim changes as an express direction to the debtor to conduct its business on specific terms per the court's power under § 1107 of the Bankruptcy Code to authorize a debtor to continue its business on whatever terms the court sets. Thus, any further administrative expense claims will be limited to the amount of any wages and benefits earned at the lower authorized rates.

352. *See supra* note 55.

353. *See supra* note 161 and accompanying text.

354. *See supra* notes 160-64 and accompanying text. Although Justice Rehnquist seemed to imply in *Bildisco* that, if a contract is not rejected, it is assumed, this clearly is not the case under § 365.

355. Section 1113(a) begins: "The debtor in possession . . . may *assume* or *reject* a collective bargaining agreement only in accordance with the provisions of this section." 11 U.S.C.A. § 1113(a) (West Supp. 1985) (emphasis added).

adequate assurance of future performance under the contract.³⁵⁶ The court must approve any assumption of the collective bargaining agreement.³⁵⁷ If a debtor has been seeking to reject its collective bargaining agreement, it is unlikely it will be willing to assume it. Furthermore, if the debtor has been in breach of the contract either before or after filing bankruptcy, it may not be able to assume it because of its inability to cure its breach. Finally, there is no incentive for the debtor to assume the contract, because the only effect of assumption will be to foreclose a later attempt at rejection if circumstances change.

No provisions in section 1113 limit the debtor to one application for rejection. Under section 365, a contract may be assumed or rejected at any time *before* confirmation of a reorganization plan.³⁵⁸ Because section 1113 makes no provision in this regard, section 365 presumably would continue to set the limits on when assumption or rejection may occur. Accordingly, the debtor may petition a second time for rejection, as long as no reorganization plan has been confirmed. The debtor would be required again to go through all the steps set forth in section 1113 as prerequisites to rejection.

As long as the contract has not been rejected, it continues in effect. The contract rates will continue to set the rates for the valuation of any claims filed in bankruptcy, whether they are administrative expense claims or lower priority claims. On the other hand, the union will continue to be bound by the contract and by any agreement, express or implied, not to strike during its term. If disputes arise during the remaining term of the contract, they may be adjudicated under its grievance and arbitration provisions, with any final arbitration award enforced by the bankruptcy court or through the bankruptcy claims procedure.³⁵⁹

Presumably, the NLRB will continue to be deprived of its jurisdiction under section 8(d) to prevent any court-authorized unilateral modifications of the contract during its remaining term. If rejection is denied, but the employer tries to make any unilateral changes without seeking bankruptcy court approval under section 1113(e), it is an open question whether the union could file an unfair labor practice charge under the NLRA or whether the union's recourse would be to return to the bankruptcy court to hold the employer in contempt of the court's order denying rejection. The union may also file additional claims in bankruptcy for any new breaches of the contract's terms. If it was Congress' intent to have section 1113 take precedence over section 8(d), the jurisdiction of the NLRA may be suspended as long as the debtor continues to have the opportunity to seek rejection of the contract under section 1113 (i.e., until a reorganization plan is confirmed).

If the contract expires by its own terms during bankruptcy, rejection of the contract will no longer be possible. The collective bargaining agreement will no longer be an executory contract subject to rejection.³⁶⁰ At this point, any suspension

356. 11 U.S.C. § 365(a), (b) (1982).

357. 11 U.S.C. § 365 (a) (1982).

358. 11 U.S.C. § 365(d)(2) (1982).

359. See Berger, *supra* note 154.

360. See *supra* note 54.

by section 1113 of the NLRA's duty to enforce section 8(d) against the debtor will end. If no collective bargaining agreement is in effect between the parties, the parties will once more be subject to the normal labor law obligation to bargain for a new contract. If they bargain to impasse without reaching agreement, the debtor may then implement any changes in terms and conditions of employment consistent with its last offer to the union.³⁶¹ On the other hand, the employees will be free to strike because they will no longer be bound by the contract's no-strike clause.³⁶² Several rejection applications, hearings, and court decisions could have been avoided if the bankruptcy courts were aware that once a contract expires, an employer may make unilateral changes in employment conditions as long as it first exhausts its duty to bargain in good faith with the union by bargaining to impasse.³⁶³

2. When Rejection is Granted

Let us now assume that the bankruptcy court grants rejection of the collective bargaining agreement. What happens next? More specifically, may the employer change the terms and conditions of employment upon rejection of the contract? If so, may the employer make whatever changes it desires, or is it limited to those changes contained in its proposal of necessary modifications under section 1113? Congress did not answer these questions in section 1113, but the implications contained in its limits on unilateral changes suggest that the employer may make unilateral changes only in conformity with its duty to bargain in good faith for a new contract.

Approval of rejection of a collective bargaining agreement results in termination of the contract. The collective bargaining agreement ends and is no longer enforceable or in effect; there is now *no* collective bargaining agreement between the

361. See *supra* notes 26-27 and accompanying text.

362. See *supra* note 66. In addition to the requirement of good faith bargaining, § 8(d) of the NLRA also requires that the employer give the union sixty days notice prior to changing any terms and conditions of employment as they existed under the expired contract, or prior to any lockout. The union must also give sixty days notice to the employer before striking. In addition, both parties are required to give notice to the Federal Mediation and Conciliation Service of the existence of a labor dispute within thirty days of the above sixty day notice. 29 U.S.C. § 158(d) (1982). See text of § 8(d), *supra* note 48. These provisions apply whenever a collective bargaining agreement is in effect between the parties. Their purpose is to give the parties a cooling-off period in which to negotiate a subsequent agreement free from strikes or lockouts and with the possible assistance of mediation. Because the contract under this scenario is expiring by its own terms and is not being terminated by rejection, these § 8(d) cooling-off procedures would apply to the expiration of the old contract and the subsequent negotiation of a new one.

363. See, e.g., *In re Salt Creek Freightways*, 47 Bankr. 835 (Bankr. D. Wyo. 1985); *In re Allied Delivery Sys.*, 49 Bankr. 700 (Bankr. N.D. Ohio 1985). In *Salt Creek Freightways*, the motion to reject was filed on March 1 and granted on March 28, three days before the collective bargaining agreement was due to expire. 47 Bankr. 835, 837, 842. In *Allied Delivery System*, rejection was requested on February 7 and granted on March 21, ten days before the contract would have expired. 49 Bankr. 700, 701, 704. In these cases rejection was not necessary to allow the employers to change working conditions. Normally, notice under § 8(d) is given and bargaining in earnest begins several weeks before a collective bargaining agreement expires so that either a new contract will have been negotiated or impasse will have been reached by the contract's expiration date. If normal bargaining had taken place in these cases, the debtor would have been in a position to implement its last offer and reduce wages and benefits upon expiration of the contract without seeking rejection.

See also *In re K & B Mounting, Inc.*, 50 Bankr. 460 (Bankr. N.D. Ind. 1985). In *K & B Mounting*, there had been no signed contract between the employer and union for three years prior to the motion to reject. Since the employer had withdrawn from a multi-employer bargaining unit in 1982, there had been no written collective bargaining agreement in effect between the parties. The employer, however, had been voluntarily abiding by the terms of the multi-employer bargaining unit's current contract. Without any discussion of whether there was an executory contract in effect, the court denied the employer's application to reject the unsigned but honored contract. *Id.* at 462, 468.

parties. As discussed above, when a collective bargaining agreement expires, the employer may make unilateral changes in the prevailing status quo, but only after it has bargained to impasse with the union. Any changes must be consistent with its last offer to the union.³⁶⁴

Because section 1113 contains no provision dealing with the postrejection period, we may assume the parties are subject, once again, to the provisions and obligations of the NLRA.³⁶⁵ Indeed, the Supreme Court in *Bildisco* was eager to reassure the parties that the debtor was an employer under the NLRA and was bound by the duty to bargain in good faith for a new collective bargaining agreement.³⁶⁶ The Court, however, did not have to address the issue whether the employer could immediately change terms and conditions of employment upon rejection because it held that the employer could do so immediately on filing bankruptcy. Congress reversed this holding of *Bildisco*, but did not directly regulate what happens after rejection. It did provide for court authorization of interim changes, pending rejection, and allowed the employer to terminate or modify *the contract* in the event the bankruptcy court did not rule on rejection within thirty days of the hearing. Again, however, this right of the employer to terminate or modify the contract ends with an eventual court ruling on rejection.³⁶⁷ Once the contract is terminated by rejection, there is no contract to modify. Without any express direction from Congress, we are left with the task of structuring the relationship between the debtor and its union in

364. See *supra* notes 26–27 and accompanying text.

365. When an employer files a Chapter 11 bankruptcy petition, that filing does not relieve the employer from meeting its continuing legal obligations under federal and state law. *United States v. Nixon*, 235 U.S. 231 (1914); *Cullen v. Bowles*, 148 F.2d 621 (2d Cir. 1945). The Bankruptcy and Judiciary Codes together make it clear that a debtor-in-possession must obey the law except where a statute or court specifically alters the debtor's legal duties. Section 959(a) of the Judiciary Code states that "[t]rustees . . . of any property, including debtors in possession, may be sued . . . with respect to any of their acts or transactions in carrying on business connected with such property" subject to the Bankruptcy Court's discretionary equitable powers. 28 U.S.C. § 959(a) (1982). In addition, § 959(b) states:

"[A] debtor in possession . . . shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State . . . in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

28 U.S.C. § 959(b) (1982). The continuing obligation of the employer as debtor-in-possession to conduct its business in accord with federal law has been affirmed in a variety of cases. See, e.g., *Otte v. United States*, 419 U.S. 43 (1974) (the Internal Revenue Code); *United States v. Nixon*, 235 U.S. 231 (1914) (livestock quarantine restrictions); *Cullen v. Bowles*, 148 F.2d 621 (2d Cir. 1945) (wartime price controls); *In re Northern Boneless Meat Corp.*, 9 Bankr. 27 (S.D.N.Y. 1981) (the Packers and Stockyards Act); *In re Canarico Quarries*, 466 F. Supp. 1333 (D.P.R. 1979) (permit requirements and air pollution standards); *Brennan v. T & T Trucking, Inc.*, 396 F. Supp. 615 (N.D. Okla. 1975) (overtime provisions of the Fair Labor Standards Act).

Debtors have sought protection from various legal obligations under the automatic-stay provisions of the Bankruptcy Code, 11 U.S.C. § 362, but the automatic stay protects the debtor only from suits or administrative proceedings arising out of the debtor's *prepetition* conduct. Section 362(a)(1) automatically stays "the commencement or continuation . . . of . . . proceedings against the debtor that were or could have been commenced before the commencement of the case under this title." 11 U.S.C. § 362(a)(1) (1982). Even then, this automatic stay protection does not extend to actions by a governmental agency to enforce its police or regulatory power, which are expressly exempted: "The filing of a petition . . . does not operate as a stay— . . . under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. § 362(b)(4) (1982). This exemption, allowing governmental entities to continue to prosecute a debtor-in-possession for prepetition violations, reinforces the proposition that filing a bankruptcy petition does not relieve an employer from its obligation to conduct its business in accordance with state or federal law.

366. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 534 (1984). See *supra* note 107 and accompanying text.

367. Section 1113(d)(2) provides: "[T]he trustee may terminate or alter any provisions of the collective bargaining agreement *pending* the ruling of the court on such [rejection] application." 11 U.S.C.A. § 1113(d)(2) (West Supp. 1985) (emphasis added).

a manner consistent with both bankruptcy and labor law. Several scenarios are possible.

a. *If Interim Changes Have Been Authorized*

If the debtor has requested and the court has approved interim changes under section 1113(e), these interim changes, along with the unilateral provisions of the collective bargaining agreement, constitute a new, albeit temporary, status quo in the terms and conditions of employment. If these interim changes could be regarded as establishing a new and continuing status quo under labor law, the employer would be justified in maintaining this status quo until a new contract is negotiated. A logical way to reconcile the bankruptcy provisions with the NLRA would be to consider these interim changes as creating such a new status quo, which must be maintained until a new contract is negotiated or the parties have bargained to impasse. Under this approach, the debtor would be prevented from making any additional changes in terms and conditions of employment upon rejection, but would be justified in continuing to abide by the interim court-authorized changes pending exhaustion of the duty to bargain in good faith for a new contract.

This result is not mandated by the Bankruptcy Code. Section 1113(e) expressly states that the bankruptcy court may authorize interim changes only "during a period when the collective bargaining agreement continues in effect" and strongly implies that such changes are temporary, until rejection is either granted or denied.³⁶⁸ If the changes must end upon approval of rejection, however, the terms and conditions of employment would revert back to those in effect under the now rejected contract. Surely, Congress did not intend this to happen. It would be contrary to the purpose behind section 1113(e) of giving the debtor the immediate flexibility needed to continue its business so that a successful reorganization will remain a viable alternative to liquidation. On the other hand, Congress did not give the debtor the right to ignore its NLRA obligations and set whatever terms and conditions of employment it likes upon approval of rejection.

In order to resolve this dilemma, defining interim changes as *temporary until a new collective bargaining agreement is negotiated by the parties* has the advantage under bankruptcy law of allowing the debtor to continue in effect those changes which the court has already found to be "essential to the continuation of the business." Under labor law, this result protects the union and the employees from unrestrained unilateral action by the debtor, because it allows the debtor to continue in effect only those changes previously reviewed and authorized by the court, a neutral party in the labor dispute.³⁶⁹ By expressly authorizing the changes to remain

368. "The implementation of such interim changes shall not render the application for rejection moot." 11 U.S.C.A. § 1113(e) (West Supp. 1985). Presumably, under these provisions, if rejection is denied after interim changes are authorized, the interim changes would end and the terms of the old contract would become enforceable again. See *In re Wright Air Lines*, 44 Bankr. 744 (Bankr. N.D. Ohio 1984), and *supra* note 334 and accompanying text.

369. This is the result reached in *In re Salt Creek Freightways*, 46 Bankr. 347 (Bankr. D. Wyo. 1985), but without any discussion of the meaning of the word "interim." No application to reject the contract was pending. The court specified that the interim changes authorized by the court would remain in effect until the present contract expired "or until a new collective bargaining agreement is negotiated with the Union, whichever first occurs." *Id.* at 351.

in effect until a new contract is negotiated, even if rejection is approved, the bankruptcy court will have established, by court order, a new status quo to serve as the foundation from which to negotiate a new collective bargaining agreement. Regarding these changes as a part of the prevailing status quo when rejection is granted will accommodate the bankruptcy goal of promoting a successful rehabilitation, while also furthering the NLRA's goal of insuring good faith bargaining.

b. *Where No Interim Changes Have Been Authorized*

If no interim changes have been authorized, the status quo in effect when rejection is granted consists of the terms and conditions of employment contained in the now terminated contract. Under section 8(a)(5) of the NLRA, the debtor is obligated to bargain to impasse for a new contract before it may unilaterally implement any changes in terms and conditions of employment. It may now become significant whether the parties had bargained to impasse prior to rejection on the debtor's proposed necessary modifications. If they did, and if the debtor's section 1113(b) proposal constitutes its proposal for a new contract, then upon rejection, the NLRA would allow the debtor to implement immediately the changes contained in its proposal. There is no reason to require the parties to bargain to impasse a second time on the same proposed changes, simply because now the parties are bargaining for a new contract, not bargaining on the section 1113(b) proposal to modify the old contract. If the parties had not yet reached impasse, or if impasse has been broken by a shift in bargaining positions, then further bargaining would be required before the debtor may make unilateral changes. If the debtor wants to abandon its section 1113(b) proposal, and make a different offer as its proposal for a new contract, then bargaining to impasse would be required on this new proposal. Any unilateral changes made must be in accord with the debtor's final offer to the union.

Language in some bankruptcy court opinions seems to imply that approval of rejection carries with it the authority for the debtor to immediately change conditions of employment without any consideration of these bargaining obligations. In *Salt Creek Freightways*, the court granted rejection of a collective bargaining agreement that was to expire in three days so the debtor could presumably escape from labor law's bargaining requirements:

It is clear from the evidence that the debtor will be forced into liquidation if it is not allowed to implement all of its cost-cutting plans, including the reduction of wages and benefits for its union personnel

Lastly, even though the agreement in question arguably expires March 31, 1985, it is not clear, absent rejection, whether under the National Labor Relations Act the debtor may make unilateral changes in a collective bargaining agreement, after the apparent expiration of the contract.³⁷⁰

370. 47 Bankr. 835, 841-42 (Bankr. D. Wyo. 1985). The court erred in its approach, viewing the issue as a question of making changes in a collective bargaining agreement. The contract will have expired, however, so the employer will be making unilateral changes in the status quo, not in the contract.

The court assumed that *with rejection* it is clear the employer *may* make unilateral changes in the existing status quo. The court, however, cited no statutory or other basis for this assumption.³⁷¹ Although the court was not explicit about what unilateral changes the debtor may make, it seemed to assume the debtor may implement only the cost-cutting plans contained in its proposal of necessary modifications. Citing *Bildisco*, the court did reaffirm that, following approval of rejection of the collective bargaining agreement, the status of the union as the exclusive bargaining representative remains unchanged and "the debtor will continue to have a duty to bargain in good faith towards achieving a new contract with the Union."³⁷²

In a similar case, the court in *Allied Delivery* also assumed rejection of the collective bargaining agreement gives the debtor the right to change working conditions immediately:

The evidence herein clearly demonstrated that the financial drain on this debtor is enormous. The cutting of labor costs is essential. . . . The debtor herein is in no position to continue to pay salaries and benefits at the current level, much less to be subject to a cost of living increase.³⁷³

Again, as in *Salt Creek*, the collective bargaining agreement was going to expire by its own terms only ten days after the court issued its opinion. The court recognized that rejection would subject the debtor to the duty to bargain in good faith for a new contract. The court was worried, however, about a provision of the soon-to-expire contract which provided for a future cost-of-living wage increase to go into effect the day *after* the contract expired. The court was of the opinion that without rejection the debtor would be bound by the cost-of-living increase, whereas with rejection it would not be.³⁷⁴ The court's assumption was incorrect. Whether the contract is rejected or not, failure to pay the cost-of-living increase would be a breach of contract resulting in merely another monetary claim by the employees against the estate. Rejection would simply prevent the claim from becoming a possible first priority administrative expense, converting it to a lower priority prepetition claim.³⁷⁵

371. Indeed, from additional remarks of the court, it appears that the court's major concern, prompting it to grant rejection of the contract *three days before it expired*, was to convert any employee claims for breach of the contract from first priority administrative expense claims to third, fourth, or no priority unsecured claims for wages and benefits. *Id.* at 842 n.2. The court tried to justify this by pointing to the fact that, even with rejection, the union employees will be better off than the nonunion employees; the nonunion employees will not be able to assert any claims in bankruptcy because they are not working under an employment contract. It should be obvious, however, that this "advantage" of the union employees to assert unsecured claims, with a lower or no priority, does not arise from the Bankruptcy Code but from the fact the union employees organized in the first place.

372. *Id.* at 842.

373. *In re Allied Delivery Sys.*, 49 Bankr. 700, 704 (Bankr. N.D. Ohio 1985).

374. *Id.*

375. Even without rejection, the cost-of-living wage increase could serve as a basis for an administrative expense claim, but only if it were considered a part of the reasonable value of the employees' services. This is unlikely.

The court's opinion seems to assume that without rejection the union could somehow obtain specific performance of the cost-of-living wage increase provision in the contract, forcing the employer to actually pay the higher wage. It would be impossible to obtain an injunction granting such specific performance, however, when legal damages constitute an adequate remedy at law. Furthermore, the only court order a union is able to obtain to enforce a collective bargaining agreement under § 301 is an injunction to compel arbitration, which would result in an arbitration award for back pay equal to the cost-of-living increase enforceable only through the bankruptcy claims procedure.

Finally, the court was eager to grant rejection because "the union was unable to offer any assurances that a new agreement between the union and the debtor could be speedily reached once the existing contract does expire."³⁷⁶ Obviously, neither the debtor's attorney nor the union's attorney were able or willing to explain to the court that the debtor did not have to wait for a new contract before it could unilaterally change terms and conditions of employment. Once it bargained to impasse, it would be free to implement whatever reductions in labor cost it desired, consistent with its last offer to the union at the bargaining table.

In contrast to *Salt Creek Freightways* and *Allied Delivery*, the court in *American Provision* explicitly recognized that the effect of rejection would be only to accelerate the process of bargaining for a new contract. The contract then in effect expired in approximately eight months. The court found that rejection would force both parties to bargain now instead of eight months later. The court stated that "[i]f the debtor's rejection of its collective bargaining agreement was approved, such rejection would not affect the Union's status as the authorized representative of those employees nor the debtor's obligation to bargain with the Union."³⁷⁷ In a footnote, the court explained: "As a general principle, rejection of a collective bargaining agreement does not affect the rights and responsibilities under the National Labor Relations Act."³⁷⁸ The court denied rejection, forcing the debtor to wait until the contract expired before it could legally change terms and conditions of employment.

Although the courts have agreed that once rejection occurs, the debtor employer is bound by the bargaining obligations of section 8(a)(5) of the NLRA, no court has explored the ramifications of this postrejection bargaining obligation. Furthermore, the federal appellate courts, prior to the enactment of the new bankruptcy provisions, had been allowing debtors to make unilateral changes in terms and conditions of employment upon rejection beginning with the case of *REA Express* under the "new entity" successor employer theory.³⁷⁹ The Supreme Court in *Bildisco*, however, overruled the "new entity" theory which had previously justified the employer's escape from the prohibitions of the Railway Labor Act or the NLRA against unilateral changes. Congress, in turn, overruled the Supreme Court, rejecting the Court's rationale for allowing such changes (that the Bankruptcy Code itself modified the contract and that therefore sections 8(d) and 8(a)(5) did not apply). Consequently, neither the "new entity" successor employer theory of *Kevin Steel* and *REA Express*, nor the debtor's inherent power under the Bankruptcy Code per *Bildisco*, can serve any longer as a basis for allowing the debtor to make unilateral changes as soon as the contract is terminated by rejection.

More importantly, the enactment of section 1113 has removed any justification for allowing a debtor to make unilateral changes upon rejection without first bargaining to impasse. Unilateral action is no longer necessary on the grounds that the

376. 49 Bankr. 700, 704 (Bankr. N.D. Ohio 1985).

377. *In re American Provision Co.*, 44 Bankr. 907, 910-11 (Bankr. D. Minn. 1984).

378. *Id.* at 911 n.8, citing *Briggs Trans. Co. v. International Bhd. of Teamsters*, 40 Bankr. 972 (D. Minn.), *aff'd*, 739 F.2d 341 (8th Cir. 1984).

379. *See supra* notes 112-14 and accompanying text.

debtor could not otherwise make necessary changes quickly enough to keep financially afloat. Until *Bildisco*, many unions refused to negotiate any changes in their contracts because they continued to maintain that the contract was immune from modification or rejection under section 8(d). Since rejection of the contract is now clearly possible, unions have no incentive to avoid prompt and serious negotiations. Moreover, the duty to bargain under the NLRA is now incorporated in the Bankruptcy Code by section 1113's obligations "to meet at reasonable times and confer in good faith," at least with regard to necessary modifications. Consequently, by complying with the requirements of section 1113, the debtor has already substantially completed the bargaining process required by the NLRA on those changes contained in its section 1113(b) proposal.

Furthermore, Congress has now provided in section 1113(e) a means by which any immediate changes needed to keep the business going may be made under court supervision. As long as these interim changes are allowed to continue into the postrejection period, the debtor will have no need to violate the NLRA in order to pursue the bankruptcy goal of successful rehabilitation. If such emergency interim changes are not sought by the debtor, or are not authorized by the court, the debtor should not be allowed to avoid section 1113(e) and make unilateral changes after rejection, except in conformity with the NLRA.

The situation confronting employers covered by the Railway Labor Act (RLA), not the NLRA, is more complicated.³⁸⁰ The result, however, should be the same. Under the RLA the duty to bargain which attaches on termination of the old contract includes several steps and is deliberately structured to extend over a substantial period of time.³⁸¹ Because of section 1113(e)'s provision for interim changes, however,

380. This discussion is applicable only to those employers covered by the RLA who are not railroad employers. Contracts covering railroad employees may not be rejected because of the provisions of § 1167 of the Bankruptcy Code. See *supra* note 61. The prime example of a nonrailroad employer covered by the RLA is an airline company.

In the RLA, employers are referred to as "carriers." The Act defines "carriers" as follows:

The term "carrier" includes any express company, sleeping-car company, carrier by railroad . . . and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in possession of the business of any such "carrier": *Provided, however*, that the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. . . . The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipples, and the operation of equipment or facilities therefor, or in any of such activities.

45 U.S.C. § 151(1) (1982). In 1936 the Act was amended to include airlines. See Act of April 10, 1936, Pub. L. No. 74-487, § 201, 49 Stat. 1189. Section 181 provides in pertinent part:

All of the provisions of subchapter I of this chapter . . . are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

45 U.S.C. § 181 (1982).

381. See *supra* notes 109-10. Per §§ 1113 and 1167 of the Bankruptcy Code, this extenuated bargaining procedure continues to apply to railroad employers. See *supra* note 61. The RLA remains an absolute barrier to any unilateral

there is no reason to treat these employers any differently after rejection than employers covered by the NLRA. These debtors have the option of requesting immediate interim changes essential for the continuation of their business under section 1113(e), and this right to seek interim changes continues as long as the contract remains in effect. If the bankruptcy court terminates the contract by approval of rejection, then under the language of section 1113(e), the debtor's right to request interim changes expires. If the debtor has not sought changes prior to rejection, one may safely conclude that no changes in the terms and conditions of employment, as set by the now terminated contract, were essential to keep the business going. If the debtor sought and the court approved interim changes, the changes should remain in effect during the negotiations over a new contract. Therefore, the debtor should be required to complete even the more extenuated bargaining process required by the RLA before it may make unilateral changes.

This conclusion—that no unilateral changes may be made after rejection without bargaining to impasse—may put greater pressure on the debtor to seek interim changes under section 1113(e). This result is preferable, however, to allowing the debtor to wait, not seek interim changes, and then make unilateral changes after rejection. It subjects any changes in the employees' working conditions to judicial scrutiny and control. It also gives the union protection from arbitrary employer action because it guarantees the union prior notice and a chance to be heard before any changes are made.

In the alternative, if section 1113 is interpreted to allow the debtor to make immediate changes upon the approval of rejection, without further bargaining, then any changes should be limited to those contained in the debtor's final section 1113(b) proposal. Congress did not intend to give the debtor a free hand to violate the labor laws, but carefully circumscribed the debtor's options by requiring court supervision over the bargaining and rejection process. The major purpose behind section 1113 was to impose a good faith bargaining requirement on the parties so that rejection could be avoided, if at all possible, by agreement on those modifications in terms and conditions of employment necessary for successful reorganization. A debtor will be encouraged to take this prerejection bargaining process more seriously if the courts prohibit or limit any changes it may make following rejection to those contained in its section 1113(b) proposal. If the debtor could immediately implement any changes it desired, it would have a greater incentive simply to go through the motions of bargaining by appearing to bargain in good faith on necessary modification, while waiting to make more drastic changes as soon as rejection is granted. The debtor, of course, takes the risk that the court will find that it did not bargain in good faith, with a resulting denial of rejection. The debtor will not even be tempted to take this risk, however, if it is limited to its section 1113(b) proposal in making any immediate changes if rejection is granted.

changes regarding the working conditions of railroad employees until all steps of the RLA bargaining and mediation procedure are completed.

As soon as rejection is granted, regardless whether the debtor is allowed to implement any unilateral changes immediately, the union is free to call a strike. Once the contract ends, the union is released from its no-strike promise. If the union strikes and the parties' bargaining deadlock continues for any length of time, the bankruptcy goal of successful reorganization becomes increasingly remote and the prospect of liquidation more likely. The case of *Wheeling-Pittsburgh Steel* provides a current example of both sides risking liquidation rather than reaching agreement.³⁸² Thus, in the final analysis, even if rejection is granted, reorganization will be successful only if the parties are able to negotiate a new contract. To facilitate agreement in the place of economic warfare, the bankruptcy and other federal courts must interpret and apply section 1113 in such a way as to emphasize and reinforce the parties' duty to bargain in good faith over modifications before rejection. Only if rejection is avoided altogether will the risk of a strike and its consequences be eliminated.

F. *The Jurisdiction of the NLRB to Enforce the Postrejection Duty to Bargain*

The final issue to be resolved is which entity, the bankruptcy court, the NLRB, or both, should have jurisdiction to enforce the obligation of the employer to bargain to impasse prior to making unilateral changes after rejection. On the one hand, the bankruptcy court has been intimately involved in the previous activities of the parties, having scrutinized their actions carefully to determine if the equities clearly balance in favor of rejection. If, as a part of the rejection process, the bankruptcy court has found that the parties have bargained to impasse on the debtor's proposed modifications, there seems to be no reason not to allow the debtor to implement these proposed changes immediately after rejection. If, however, the union wants to challenge the employer's unilateral action or the finding of impasse, where does it go?

No statutory basis exists for the bankruptcy court to continue to enforce the parties' bargaining obligation after rejection. Reading the Bankruptcy Code and the NLRA together, one must conclude that primary jurisdiction to enforce this continuing bargaining obligation lies with the NLRB, not the bankruptcy court. As discussed above, a bankruptcy trustee and a debtor-in-possession are expressly included in the definition of "employer" under the NLRA,³⁸³ and the NLRB has always had jurisdiction over any unfair labor practices which are committed by a debtor-in-possession during the administration of the bankruptcy estate.³⁸⁴ In addition, both the Supreme Court in *Bildisco* and various members of Congress have cautioned against asking the bankruptcy courts to make any labor law determinations

382. Even though the district court affirmed the bankruptcy court's approval of rejection in *Wheeling-Pittsburgh Steel*, it urged the parties to reach agreement in order to avoid an almost certain liquidation. *In re Wheeling-Pittsburgh Steel Corp.*, 120 L.R.R.M. (BNA) 2198, 2205 (W.D. Pa. 1985). The strike has even prompted a realignment of the management of the company, with the largest shareholder taking over as chairman of the board, causing the chief executive officer and two-thirds of the board members to resign. Wall St. J., Sept. 23, 1985, at 3, col. 2.

383. See *supra* note 62 and accompanying text.

384. See *supra* notes 159-60 and accompanying text. The bankruptcy courts have been allowed to enjoin the NLRB from pursuing actions against debtors-in-possession in only those rare cases where the regulatory enforcement has been held "to threaten the assets of the estate." *NLRB v. Superior Forwarding, Inc.*, 762 F.2d 695 (8th Cir. 1985); *In re Shippers Interstate Serv.*, 618 F.2d 9 (7th Cir. 1980); *In re Bel Aire Chateau Hosp.*, 611 F.2d 1248 (per curiam) (9th Cir. 1979).

which are outside their area of expertise.³⁸⁵ The justification that exists to allow the bankruptcy courts to enforce the impasse requirement before rejection does not exist postrejection. Although Congress specifically required the bankruptcy courts to require debtors to meet and confer in good faith prior to rejection, Congress made no provision in section 1113 for the bankruptcy courts to assist the parties in reaching agreement on a new contract after rejection of the old one.

The proper procedure to follow to contest any unilateral changes made by the employer after rejection, but before impasse, would be for the union to file unfair labor practice charges with the NLRB for violation of section 8(a)(5). If the bankruptcy court has already made a finding on impasse as a part of the rejection procedure, the debtor could offer this finding as evidence during the NLRB proceeding. The Board would be justified in according such a judicial finding whatever weight seemed appropriate under the circumstances, much as the Board defers to arbitration decisions implicating possibly unfair labor practice issues.³⁸⁶ If the impasse issue actually was raised and decided during the rejection hearing, there would be little reason for the NLRB to readjudicate the issue, unless intervening events have cast doubt on the continued existence of the impasse. If, during the bankruptcy proceeding, no evidence on impasse was offered or no question of impasse decided, the NLRB would be free to make an original finding on whether or not impasse had occurred prior to the debtor's imposition of unilateral changes in working conditions.

Although the NLRB should have jurisdiction to determine whether the debtor has violated the NLRA, any resulting unfair labor practice award would become a claim on the bankruptcy estate to be presented and allowed as a claim in the bankruptcy process. The NLRB may determine if an unfair labor practice has occurred and may compute any resulting back pay award resulting from the difference in wages and benefits actually paid by the debtor and those wages and benefits which should have been paid pursuant to the status quo in effect when rejection was granted.³⁸⁷ The NLRB is not free, however, under the Bankruptcy Code to enforce the resulting monetary judgment. Any monetary award must be enforced, if at all,

385. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 534 (1984). The majority commented:

Whether impasse has been reached generally is a judgment call for the Board to make; imposing such a requirement as a condition precedent to rejection of the labor contract will simply divert the Bankruptcy Court from its customary area of expertise into a field in which it presumably has little or none.

Id. at 534. Senator Thurmond remarked: "The . . . 'without good cause' [requirement] is obviously not intended to . . . turn the bankruptcy courts into a version of the National Labor Relations Board." 130 CONG. REC. S8888 (daily ed. June 29, 1984). See also the remarks of the bankruptcy court in *In re C & W Mining Co.*, 38 Bankr. 496 (Bankr. N.D. Ohio 1984), in denying rejection of a collective bargaining agreement under *Bildisco*, not § 1113, because of the bad faith and refusal to bargain by the debtor:

The court's discussion of bad faith, relates solely to the issue, under section 365(a) concerning C. & W.'s motion to reject its contract with the Union. The court notes that, at the time the petition was filed, C. & W. and the Union were parties to labor-related actions in the district court and before the National Labor Relations Board. The court expresses no opinion on the merits of those actions. The court has tried to stay within the field of its expertise and its decision is grounded solely in bankruptcy law.

Id. at 504.

386. See *supra* note 50.

387. See *MORRIS*, *supra* note 23, at 1665.

through the bankruptcy claims procedure.³⁸⁸ Assuming the bankruptcy court allows the unfair labor practice award as a claim against the estate, it would normally be given first priority as an expense of the administration of the estate because the debtor committed the unfair labor practice during the administration period and the award was attributable to services rendered during administration.³⁸⁹

VII. CONCLUSION

Congress made a determined effort to resolve the conflicts between labor law and bankruptcy in the enactment of section 1113. Only the passage of time, the conduct of debtors and unions, and courts' interpretations of section 1113 will tell us whether Congress was successful in setting up a procedure that works. The success of section 1113 will be most evident if few cases are litigated under it. Its basic purpose is to encourage negotiated settlements, not litigated rejections. It is hoped the passage of section 1113 will reverse the trend begun by *Kevin Steel* and culminating in *Bildisco* which resulted in a continual increase in the number of cases involving rejection of collective bargaining agreements.

On the other hand, section 1113 does not answer all the questions raised by the intersection of labor law and bankruptcy. It ends abruptly with the ruling on rejection. It provides no guidance on what actions the debtor may take following rejection. To fill this void, the parties and the courts must return to familiar labor law principles to stabilize the debtor's labor relations. Only if both sides are certain of their options will they share the same assumptions about what actions their adversary may take and thus be able to make informed judgments on the risks they face. Uncertainty in labor relations often leads to increased confrontation and hostility which impedes the exchange of information and the negotiated settlement of disputes. Congress rejected the Supreme Court's attempt to reconcile the legal conflicts by elevating bankruptcy principles over labor law obligations. Now is the time to give affirmative consideration to both the obligations and concepts of the NLRA, as well as bankruptcy objectives, in order to resolve any remaining uncertainties regarding the relationship between the debtor-in-possession and the union during bankruptcy.

388. 11 U.S.C. § 362(b)(5) (1982); *Yorke v. NLRB*, 709 F.2d 1138 (7th Cir. 1983).

389. *Reading Co. v. Brown*, 391 U.S. 471 (1968); *Nathanson v. NLRB*, 344 U.S. 25 (1952); *Yorke v. NLRB*, 709 F.2d 1138 (7th Cir. 1983); see *supra* note 106.

